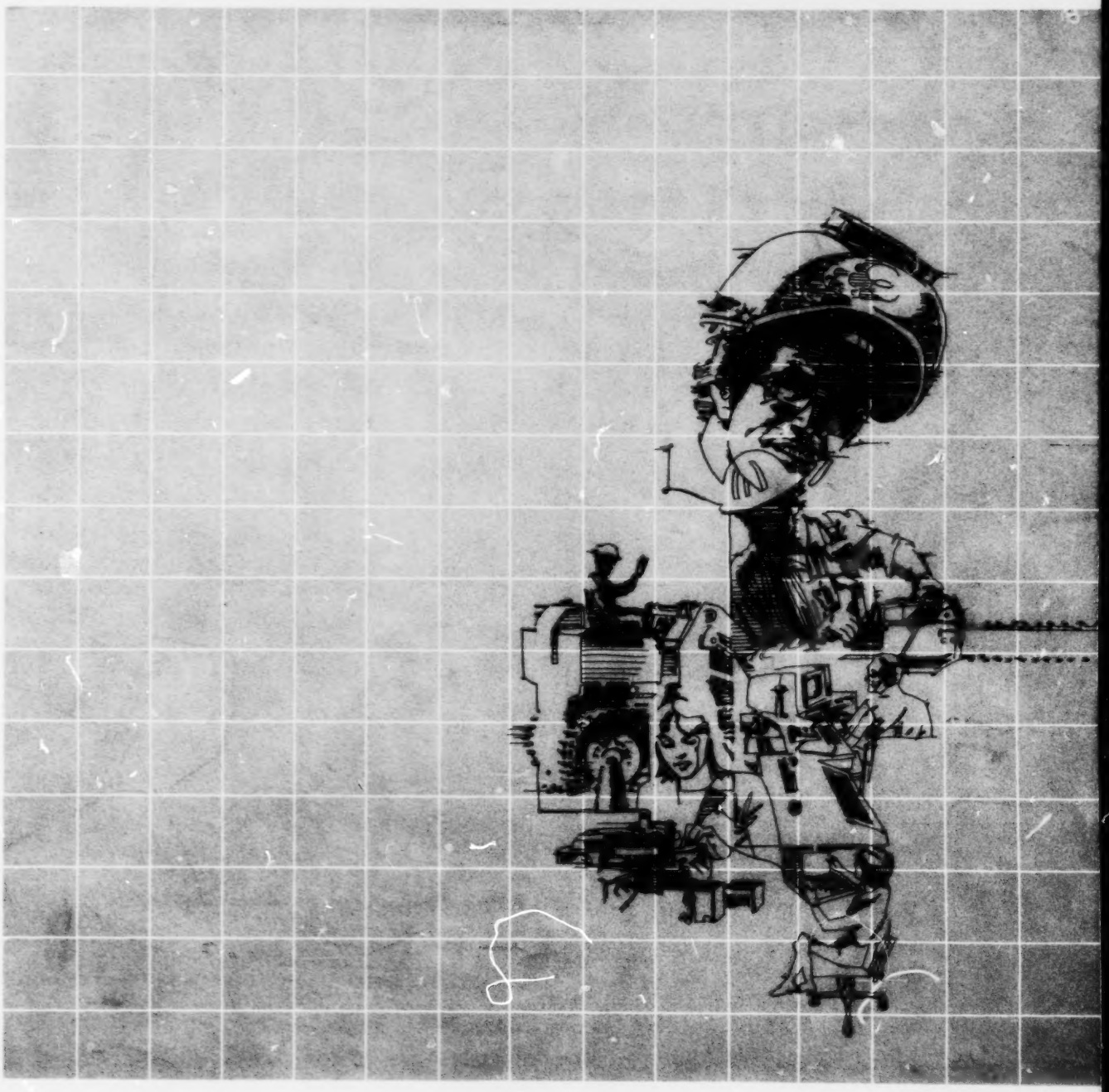
Northwest Territories

WORKERS' COMPENSATION IN THE N.W.T. REPORTS OF THE REVIEW COMMITTEE



OCTOBER 1986

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October 31, 1986

The Honourable Bruce McLaughlin,
Minister Responsible for the
N.W.T. Workers' Compensation Board,
Government of the N.W.T.,
P.O. Box 1320,
Yellowknife, N.W.T.
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Dear Sir:

The members of the Workers' Compensation Act Review Committee are pleased to submit our report on the first and second phases of our review of the Workers' Compensation Act and related matters.

Respectfully,

Letha J. MacLachlan,
Chairperson.

George Foley,
Member.

Lyle Hawkins,
Member.

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RECOMMENDATIONS OF THE WORKERS' COMPENSATION ACT REVIEW COMMITTEE

PHASE I

YEAR'S MAXIMUM ASSESSABLE REMUNERATION

1. That section 2(e) of the Workers' Compensation Act be amended as follows:

   a) the term "Year's Maximum Assessable Remuneration" should be amended to read "Year's Maximum Insurable Remuneration"; and

   b) that the words "and is equal to thirty thousand four hundred dollars effective as of July 1, 1985" be deleted.

   And that sections 35 through 63(2) of the Act be amended accordingly.

2. That the N.W.T. Workers' Compensation Board initiate collection of data on the wages of workers in the N.W.T.

3. That the recommendation of the N.W.T. Workers' Compensation Board that the YMAR level be increased to $36,800 effective January 1, 1987 be accepted on the conditions that there be no net increase to employers in the overall cost of assessments and that the opportunity to amend the Act, if necessary, with respect to all benefits tied to the YMIR be ensured.

CALCULATION OF BENEFITS

4. That the N.W.T. Workers' Compensation Board calculate benefits to injured workers on the basis of 90 per cent of net income effective January 1, 1987.

5. That net income be defined in the Act to include the gross income of a worker less his or her probable deductions for income tax, Canada Pension Plan premiums and unemployment insurance premiums.

TRANSITIONS

Basis of Compensation (revised)

6. That the pensions or benefits to injured workers, their spouses and dependants be calculated on 95 per cent of their pre-injury net income.

7. With respect to determination of income, that care be taken to ensure it is defined as "taxable" income.

On the Recommended Changes Generally

8. That care be taken not to adopt partial changes on an ad hoc basis without consideration of the impacts on the remainder of the system.

PHASE II

YEAR'S MAXIMUM INSURABLE REMUNERATION

9. That a ceiling on insurable earnings be maintained (YMIR) in order to guard against possible abuse.

10. That further increases in the ceiling on insurable earnings be contemplated with a move to a YMIR of approximately $45,000 within the next two years.

11. That the Workers' Compensation Board staff keep accurate records on the full salaries of injured claimants for the purpose of determining the percentage of claimants fully covered by the workers' compensation scheme.

12. That a formula be used to determine YMIR and that the formula ensure that 95 per cent of the N.W.T. wage earners are at or below YMIR. This figure should be adjusted annually, rounded off to the nearest one hundred dollars.

13. That the formula for setting YMIR should be based on Survey of Employment Payroll and Hours figures and should be adjusted annually by the Board.

14. That before the new YMIR figure is set each year, the figure based on S.E.P.H. should be checked against the wages of claimants in the previous year to ensure the goal of attaining coverage of the wages of 95 per cent of the workers is met; and

15. That the Board be given the authority to alter the YMIR effective January 1, 1988 and that the automatic formula be put in place effective January 1, 1989.

Seasonal Coverage

16. That section 39 of the Act be amended to allow the Board the discretion to upgrade a worker's benefits at the end of the calendar year.

Death Benefits

17. That the present calculation of dependants' pensions be unhinged from YMIR and be tied to a percentage of the deceased worker's wage equivalent to the percentage of wage used for total disabilities which, based on our recommendations, would be 95 per cent.

18. That the pension to dependants of a deceased worker be paid for a period of time and that the Board have the discretion as to whether that pension should be increased, decreased or terminated. The presumption would be that a dependant's pension would continue but would be subject to review on a regular basis. The Board would have the discretion to alter the pension after consideration of the pensioner's need. Criteria for such a determination would be similar to those used for permanent partial disabilities and would include age of dependant, marital status, family circumstances, employment, employability, ability to adapt, education, qualifications and any other factors the Board may deem relevant. If the Board decides to terminate a spouse's pension because of remarriage, they shall consider whether and in what amount to issue a lump sum payment.

19. That the pension to dependants of a deceased worker be paid on behalf of the family unit and not be divided into separate pensions for the spouse and each dependant. The pension of 95 per cent of the net income of the deceased worker shall be paid to the family unit regardless of whether that unit consists of a spouse or a spouse with one or more dependants.

20. That full transportation costs of the body of the deceased worker be paid to any point in Canada.

21. That a lump sum payment of $2,500 be paid to the deceased worker's family for burial costs or, if there is no surviving family, the actual burial costs up to a maximum of $2,500.

22. That a lump sum payment of one year's salary of the deceased worker to a maximum of YMIR and a minimum of $5,000 be paid to the spouse or, if no surviving spouse, then to be held in trust for dependant children until age 21.

23. That a plan of reducing pension scales not be adopted in the N.W.T.

24. That pensions, indexed to other income, continue after the dependant's normal retirement age would have been reached.

25. That pensions to spouses should not be less than $1,000 per month and should be subject to increases from time to time.

Disability Compensation

26. That no more than a 5 per cent reduction of net wage be imposed on total disability pensions.

27. That the minimum level of total disability pensions be not less than the net amount of $1,000 per month, that this amount be subject to increases from time to time and that the pension amount be subject to Board review in cases of undue hardship.

28. That the employer pay regular salary for the day of the injury.

29. That air transportation for an injured worker, authorized by medical personnel, be paid for by the Workers' Compensation Board.

Permanent Partial Disabilities

30. That the Act set out the criteria which the Board should consider in determining the degree of partial disability of an injured worker and that the criteria include the employee's age, education, qualifications, overall physical condition, ability to adapt, family circumstances, nature of the disability in relation to the work performed, and any other factors the Board may deem relevant.

Indexing Pensions

31. That pre-1977 pensions be updated to current levels, that ceilings on pensions be adjusted to current YMIR levels and that pensions be indexed to the cost of living.

Northern and Housing Allowances

32. That the Workers' Compensation Act and possibly the Labour Standards Act be amended to make it mandatory for all employers to continue providing northern allowances to any worker who is on compensation and is still in their employ.

Clothing Allowance

33. The removal of the words "on application of a worker" from section 49(1).

34. The removal of the maximum yearly dollar value as stated in section 49(1) of the Act; and

35. Inclusion of "Board discretion"; we would suggest that the Board's discretion be based upon a quarterly replacement of clothing.

Jurisdiction of the Board

36. That the Act be amended to include providing the Board with the authority to determine:

- whether any personal injury or death for which compensation is being claimed has arisen out of or in the course of employment within the meaning of the Act (new section);
- whether personal injury or death has been caused by accident [a replacement for section 8(2)(a)];
- the permanence or anticipated duration of disability by reason of accident [a replacement for section 8(2)(c)];
- the existence of the relationship of any member of the family and the degree of dependency [a replacement for section 8(2)(f) and (g)];
- whether a person is a worker, sub-contractor, contractor or employer within the meaning of this Act [a replacement for section 8(2)(j)];
- whether any particular disease is peculiar to or characteristic of any particular industrial process, trade, or occupation to which this Act applies (new); and
- the character of any industry, employment, establishment or department and the class to which such industry, employment, establishment or department should be assigned.

37. That in consultation with Hunters and Trappers Associations, Fishermen's Associations and other pertinent agencies, full consideration be given to extending workers' compensation coverage to hunters, trappers and fishermen on a self-coverage or an individual or group basis.

Composition and Responsibilities of the Board

38. That the number of members on the Workers' Compensation Board be reduced.

39. That the chairperson be appointed by the Commissioner-in-Council on a full-time salaried basis for a term of five years, subject to review and re-appointment.

40. That the members be appointed by the Commissioner-in-Council on a part-time basis for a term of three years, subject to review and re-appointment.

41. That the chairperson have a neutral background concerning employer/employee relations; and

42. That the members appointed not be Workers' Compensation Board staff or public service employees and that they represent an equal balance between employers and employees.

43. That the Board develop a policy such that Board members do not determine matters where they have a real or perceived conflict of interest.

44. That the Workers' Compensation Act be amended to state that the role of Workers' Compensation Board members is one of trustee to the Accident Fund and all its constituent accounts; and

45. That the Board receive training on the role and duties of a director and of a trustee, familiarization with operation of all facets of the Board, and briefing on the legal principles involved with appeal procedures.

Operation and Administration of the Workers' Compensation Board

46. An in-depth analysis of administrative procedures be performed by an independent and competent consultant who will work with senior management and the Board in developing an efficient administration.

47. Employers keep injured workers on regular salary the day of an accident. That only accidents involving time lost beyond the day of the accident or involving permanent or recurring harm be reported.

Role of the Actuary

48. That all members of the Workers' Compensation Board spend intensive sessions familiarizing themselves with the nature, purpose, function and operation of the fund and its various underwriting units and begin to decrease their reliance on the actuary.

49. That the actual preparation of primary data should be the responsibility of the Board; and

50. That the appointment of the actuary be reviewed by the Board every three years.

51. That the role of the actuary should ultimately be reduced to:

    a) evaluating the Board's long term liabilities including pension fund liabilities, at least every three years;

    b) evaluating the Board's estimated costs of increases in benefits as required;

    c) evaluating the Board's short term liabilities (i.e., continuing claims) as required;

    d) evaluating and estimating reserves for contingencies, operating and established claims on an annual basis;

    e) evaluating the annual assessment rates already determined by the Board.

Appeal Process

52. That the Board start exercising the provision for the appeals review committee set out in section 24 of the Act.

53. That the appeals review committee be composed of three people who are not members or staff of the Workers' Compensation Board.

54. That the chairperson be chosen for his/her independence and for a term of three years and the other two members serve for a two year term, one representing employees, the other representing employers.

55. That an alternate be delegated for each of the latter two committee members in preparation for conflict of interest with appellants, travel or illness.

56. That the persons appointed to these positions would receive orientation in appeals and Workers' Compensation Board procedure and would be required on an as-needed basis.

57. That the appeals review committee have the authority to consult independent experts, be they medical or otherwise.

58. That interested parties have access to information on the record (see chapter 19) and all costs should be paid from the Accident Fund; and

59. That the decision of the appeals review committee be subject to appeal by the applicant (worker or employer) to the Board.

60. That that portion of section 8 which constitutes a privitive clause be deleted because it is becoming increasingly meaningless and misleading to the public.

61. That the Act specifically allow recourse to the courts from a decision of the Board; and

62. That the court have the discretion in determining whether costs be paid from the Accident Fund; and

63. That the appeal review committee and the Board be required by the Act to forward to the appellant, their written reasons for decision.

Autonomy of Fund and Accountability to the Board

64. That the Workers' Compensation Act be amended to state clearly that the Accident Fund is one indivisible fund which is held in trust by the Workers' Compensation Board for the payment of benefits and expenses of administration under this Act.

65. That the Workers' Compensation Board adopt a policy to:

- authorize the establishment of two distinct reserves consisting of an operating reserve and a contingency reserve;
- describe the role of the contingency fund as the account required to minimize fluctuations in assessments and to reduce any undue burden to employers resulting from large scale disasters;
- describe the method of determining the upper limit on the contingency reserve;
- describe the operating reserve and the separate accounts which may be established and invested separately; such accounts to include an administrative account, a pension account, an established claims account and a pre-1977 pension account;
- require that the pension account be fully funded;
- require that the established claims account be fully funded;
- continually update expenditures in relation to indexed pensions; and
- continually update income in relation to investment performance.

66. That the Workers' Compensation Act be amended to authorize the Board to transfer pre-1977 pension assets and liabilities from private insurers.

Investments

67. That the Workers' Compensation Board continue to have sole authority to invest moneys from the Accident Fund.

68. That the Workers' Compensation Board members be given the formal responsibility for the safekeeping and proper management of the Accident Fund; and

69. That the current legislative restrictions that investment be made only in securities authorized by the Financial Administration Act, R.S.N.W.T. and section 63 of the Canada and British Insurance Companies Act R.S.C. be broadened to include any other securities authorized for investment of trust funds.

70. That the Accident Fund, investment of moneys from the Accident Fund and interest therefrom, and any real property owned by the Workers' Compensation Board be exempt from any federal, territorial or municipal taxation.

71. That the Workers' Compensation Board be allowed to invest a small percentage of the Accident Fund in securities based in or involving the North which are at arms length from the Board and which are guaranteed by the Government of the N.W.T.

72. That the Board be empowered to acquire land and real property upon receipt of approval from the Executive Council of the Legislative Assembly of the N.W.T.

73. That title to any real property or investments acquired by the Board be held in the name of the Board.

74. That provisions covering Board borrowing and repayment of moneys from the Accident Fund similar to those in P.E.I. (section 33) be examined for inclusion in the N.W.T. Act.

75. That if the Board is maintained at a size larger than three members, an investment committee with the assistance of expert advisers be struck to recommend appropriate investments to the Board for Board approval. In lieu of a committee, a fund manager should be appointed among the Board members. In addition to recommending specific investments the committee or fund manager should also be cognizant of the duration and nature of the Fund's liabilities to ensure that investments mature at the proper time to allow for pay-out on pensions or other liabilities.

76. That the Workers' Compensation Board develop and make public their investment policy; and

77. That the Board continue to include a report on the performance of its investments in the annual report which it must present to the Legislative Assembly.

Merit Rebates/Experience Rating

78. That merit rebating be discontinued and experience rating as such not be instituted; and

79. That the Workers' Compensation Board staff work closely with safety inspection departments to develop a system of focusing on unsafe work places.

Additional Coverage, Duplication of Coverage

80. That the Minister responsible for Workers' Compensation investigate the feasibility of removing the obligation to pay medical costs from the Workers' Compensation Board mandate other than those costs associated with a claimant seeking a second medical opinion for the purpose of an appeal under this Act.

81. That the Government of the N.W.T. keep abreast of universal insurance schemes already in place in other jurisdictions and that they examine the possibilities of introducing universal coverage in the N.W.T.

Employer Assessment Levels

82. That the Board make vigorous attempts to reduce assessment rates in general.

Transfer of Occupational Health and Safety

83. That the Workers' Compensation Board, the Occupational Health and Safety Division and any other workplace inspection agency responsible to the Government of the N.W.T. report to the same Minister.

84. That the Commissioner-in-Council authorize the Workers' Compensation Board to levy penalties by way of fines or increased assessments on employers found to be in violation of any safety regulations by any workplace inspection agency or official of the Occupational Health and Safety Division.

85. That officials of the Occupational Health and Safety Division or any other Government of the N.W.T. workplace inspection agency be obligated to forward a copy of all inspection reports and to inform the Workers' Compensation Board of all infractions of safety regulations.

86. That the Workers' Compensation Board claims officers be obligated to inform officials of the Occupational Health and Safety Division and any other Government of the N.W.T. workplace inspection agency of all workplace injuries or deaths which appear to involve unsafe incidents or workplaces.

87. That the Workers' Compensation Board be authorized to negotiate similar types of information exchange with federal workplace inspection agencies pertinent to the N.W.T.

88. That the Workers' Compensation Board increase their budget and activity to improve public information on the Workers' Compensation Board in general and workplace safety in particular; and

89. That the Workers' Compensation Board be authorized to enter joint funding arrangements with the Government of the N.W.T. (Occupational Health and Safety and other workplace inspection agencies)

and St. John Ambulance to develop, produce and distribute safety training and accident prevention programs; and

90. That in instances where safety programs are developed for a particular employer, the expenses for that program be charged back to the class of that particular employer.

Rehabilitation and Retraining

91. That the Workers' Compensation Board look into establishing a rehabilitation and retraining centre, in conjunction with the extended care facility that is currently being planned.

92. That the rehabilitation and retraining facilities could be used by both injured workers and the N.W.T. Health Care Plan and that the costs could be borne respectively by each party.

93. That the Workers' Compensation Board and N.W.T. Health Care Plan share the cost of providing competent medical professionals to administer both the facility and the treatments required; and

94. That retraining is a legitimate role for the Workers' Compensation Board and it be continued through on-the-job experience and institutions such as Arctic College.

Light Duty Program

95. That the Act be amended to include a modified work program.

96. That the program should be on a voluntary basis with mutual agreement by the attending physician, Workers' Compensation Board, employers and injured worker.

97. That the duties to be performed while on modified work shall be approved in advance by the attending physician and the Workers' Compensation Board.

98. That the program be monitored by the Workers' Compensation Board; and

99. If the employer does not pay the pre-injury rate of pay then the Workers' Compensation Board shall pay the difference between that salary and the pre-injury base pay.

Medical Advisers

100. To ensure that an injured employee upon his written request or that of his dependant or representative shall be entitled to seek a second medical opinion and that the cost shall be paid for by the Workers' Compensation Board.

101. To remove sections 19(1), (2), (3) and (4) from the Act because there is no need at this point for further employer involvement.

102. Both sections 24 and 25 or any other section concerned with reviews or appeals should be amended to include the right of the appellant or his representative, upon written request and before any review or appeal, to have full access to all information and reports contained in his file.

Right to Return to Work and to Job Placement

103. That the Act should be amended to:

- ensure an employer reinstates an injured employee to his former job if he is able to return to work within three months of the date of his accident, on the condition the medical adviser and Workers' Compensation Board certify that the employee is fit and able to perform such work.
- ensure an employer provides preferential hiring to an employee who is not able to return to work until after three months after the accident, such preferential consideration being for the previous position held by the employee or for an equivalent position.
- ensure an employer provides preferential hiring to a previously injured employee who is unable to perform the job he occupied at the time of the accident as a direct result of that accident; such preferential consideration being for equivalent, suitable employment in that or in another local establishment of the employer.
- ensure that employment alternatives which necessitate a move by the employee are mutually agreeable to the employer, the employee and the Workers' Compensation Board and that the costs of the move will be paid for by the employer and the Workers' Compensation Board in equal shares.

- ensure that if the previously injured worker returns to work at a reduced wage and the reason for that reduced wage is directly related to the injury, the Workers' Compensation Board shall pay to the employee the difference between the pre-injury wage and the post-injury wage until such time as the employee returns to his pre-injury wage level.

- provide an employer who does not re-employ a previously injured worker with an opportunity to "show cause" why he has not done so.

- provide an employer with all the provisions for appeal contained in the Act; and

- authorize the Board to penalize an employer for failing to show just cause for not rehiring a previously injured worker.

Workers' Advocates

104. That the Workers' Compensation Act be amended to make provision for a workers' advocate to be established and be funded from the Accident Fund.

105. That the Government of the N.W.T. develop and establish an ombudsman's office in the N.W.T. which would, among other functions, act as workers' advocate.

106. That until such time as an ombudsman's office is established in the N.W.T., a part-time workers' advocate be hired by the Minister responsible for the Workers' Compensation Board and all his expenses be paid from the Accident Fund.

107. That the independence of the workers' advocate from the Workers' Compensation Board be maintained in all respects including office location, reporting requirements, access to information and consultation with experts; and

108. That the workers' advocate have the authority and discretion to accept or decline a claimant's case depending on its merits and that where declining a case, the workers' advocate be obliged to provide the claimant with written reasons within thirty days of determining that decision.

Rights of Action

109. That the consequences and alternatives to deleting section 12(1), (2) and (3) and amending section 12(4) be thoroughly reviewed in the immediate future in co-ordination with the Workers' Compensation Board of the N.W.T. and the Association of Workers' Compensation Boards of Canada.

Interjurisdictional Coverage

110. That the Act be amended to withdraw the option of the worker to claim compensation in the jurisdiction of chioice and to specify that claims be processed only in the jurisdiction in which assessments are paid.

Collection Powers

111. That section 74(6) and (7) of the Act be rescinded.

112. That employers have the option to pay assessments on a monthly or regular basis as those assessments accrue; and

113. That year end deadlines for summaries of assessments be the 28th day of February.

Legislation in General

114. That a clause be placed in the Workers' Compensation Act stating "that whenever the masculine gender is used, it shall be considered to include the feminine gender".

115. That wherever the words "widow" or "widower" are used, they shall be changed to read "spouse" or "spousal" as applicable.

116. That, upon the rewriting of this Act, a concerted effort be made on behalf of the appropriate departments to simplify the language in the Act and make it less difficult for the public to read and understand.

117. That section 2(h) be changed to remove the words "means a member of the family of a worker who, at the time of his death" and replace with "means a person who, at the time of a worker's death".

118. That section 2(i) be changed to remove the words "which includes the employer where he is self-employed" and to combine section 2(i)(i) and section 2(i)(ii) to be the new section 2(i)(i).

119. That section 10(1)(c) be changed to read "(c) and employer or self-employed person".

120. That section 28(1)(a) be changed to read "(a) cohabited with a person and where the Board is satisfied that such a person was dependent upon the deceased worker for maintenance and support", or

121. That section 28(1)(b) be changed to read "(b) cohabited with a person and where the Board is satisfied that such person was dependent upon the deceased worker for maintenance and support and they had one or more children, or a child is born as a result of their union before the death.

122. That section 55(2) be removed from the Act and that section 55(3) become the new section 55(2).

123. That in section 55(3) the words "senior financial officer" be removed and replaced with "Commissioner or designated Minister responsible for the Consolidated Revenue Fund."

124. That section 58(1) be changed to read "(1) the accounts of the Board shall be annually audited by the Territorial auditor."

125. That section 58(2) be replaced with "The Board shall, on or before the 31st day of May in each year, prepare a report on the preceding fiscal year which shall:

a) state the activities of the Board,

b) include the financial statements of the Board prepared in accordance with appropriate accounting policies applied on a basis consistent with that of the preceding year which shall include:

(i) a statement of financial position presenting fairly the financial position of the Board at the end of the fiscal year;

(ii) a statement of operations that presents fairly the operating results for the fiscal year;

(iii) a statement of changes in financial position which presents fairly the changes in financial position for the fiscal year; and

(iv) such other statements, schedules and notes as may be necessary to present fairly the information contained in the financial statements;

c) include the report of the auditor;

d) include the opinion of the Board's actuary as to the liabilities of the Accident Fund and the adequacy of the reserves; and

e) include such other information as the Minister or the Board may require."

126. That section 58(3) be changed to read "The auditor shall report annually to the Minister on the results of his examination of the accounts and financial statements of the Board and the report shall state whether, in his opinion,

a) the financial statements present fairly the financial position at the end of the fiscal year and results of the operations and the changes in financial position for that year in accordance with appropriate accounting policies applied on a basis consistent with that of the immediately preceding year;

b) proper books of acocunts have been kept and the financial statements are in agreement with the books of account; and

c) the transactions that have come under his notice are within the powers of the Board under this Act and the regulations made under this Act and any other act and regulations that apply to the Board;

d) and the auditor shall call attention to any other matter falling within the scope of his examination that, in his opinion, should be brought to the attention of the Legislative Assembly."

127. That section 58(4) be changed to read "The auditor may require the officers and employees of the Board:

a) to produce all records, documents, books, accounts and vouchers kept in respect of the administration of this Act; and

b) to provide such information and explanations as he deems necessary."

128. That section 58(5) be included to read "The Board shall submit the annual report referred to in section 3 to the Minister on or before the 31st day of May in each year."

129. That section 58(6) be included to read "The Minister shall table before the Legislative Assembly a copy of the report referred to in section 3 at the first session of the Legislative Assembly following the receipt of the report."

130. That the existing section 58(4) of the Act become section 58(7); and

131. That section 3(3) of the regulations be changed to read "(3) Where regularly scheduled public transportation is unavailable or inconvenient, the worker may make use of a private motor vehicle and shall be reimbursed by the Board for the cost of fuel used, as well as a kilometer rate to be set by the Board and adjusted on a regular basis.

Mandatory Review

132. That the Minister appoint a committee every three years to review, consider, report and make recommendations on the Act, the regulations and the administration of the Worker's Compensation Board.

133. That the terms of references would allow the committee to consider any other matters it deemed appropriate or any matter which the Minister might refer to their attention.

PREFACE

The Workers' Compensation Act Review Committee was struck in late April of 1986 and held its first meeting in mid May, a few weeks later. The committee consisted of George Foley, president of the Steelworkers' Area Council and of Local 804 Pine Point; Lyle Hawkins, president of Fred H. Ross and Associates and a director of the N.W.T. Construction Association; and Letha MacLachlan, Yellowknife lawyer and chairperson of the Review Committee.

The terms of reference established for the committee include:

- reviewing the system by which workers and dependants are compensated for injuries and death arising out of employment injuries in the Northwest Territories;
- reviewing legislation in other jurisdictions with particular reference to recent changes;
- inviting associations and unions of employers and workers to contribute their suggestions as to how the system might be improved;
- obtaining the views of the Workers' Compensation Board and its officers who are presently administering the system;
- consulting with otner government departments where they might have advice or assistance to offer; and
- taking whatever professional or specialist advice seems appropriate.

Because of the perceived urgency of preparing and placing before the N.W.T. Legislative Assembly the legislative changes to increase the maximum rate of compensation to injured workers, the review process was divided into two phases. Phase I was to concentrate only on the "Yearly Maximum Assessable Remuneration", the method for setting it and the method for amending its level from time to time. Phase II was to attempt to explore and comment on all of the other issues of current relevance to the legislative form and administrative delivery of the workers' compensation scheme.

The Review Committee contacted a broad range of employers and employees, individually as well as through representative associations, and invited them to make submissions to each or either phase of our process. As well, the Workers' Compensation Board publicized the review through its newsletter to employers and workers, and notices were placed on the radio and in the newspapers. We had a significant oral and written response from public participants and supportive assistance from most Workers' Compensation Boards across Canada.

Thanks to the timely response of interested parties who took the time and effort to prepare their submissions, some of which were extremely impressive, this committee was able to complete both phases of the review within the scheduled time. In fact, we were honoured to be present when the bill which embodied the amendments recommended in Phase I received first reading at the October sitting of the Legislative Assembly. A copy of the report from Phase I is enclosed here, not only for purposes of clarification and continuity but because we feel that so much of the current Act is integrally tied to Year's Maximum Assessable Remuneration (renamed Year's Maximum Insurable Remuneration as a result of passage of the new legislation). We have also enclosed our comments of these legislated changes, given our subsequent opportunity to think about matters since our first report and to study the scheme in a more comprehensive fashion during our Phase II deliberations.

With respect to Phase II, the diverse and complex nature of our topic was not as concise or manageable. Indeed, we have come away from many issues feeling we have been too superficial in our treatment and have recommended further consideration by a separate task force, by subsequent review committees or by the Board itself. Indeed, it might be an idea for future review committees to be directed to examine specific issues in addition to any which their own deliberations reveal. However, we feel that we have covered a significant number of issues within the six months allotted us and hope that our comments and recommendations will help to strengthen the Workers' Compensation Board and the delivery of workers' compensation in the N.W.T.

We would like to thank all of the employees, employers, unions and associations, staff and members of the N.W.T. Workers' Compensation Board and Workers' Compensation Boards across Canada for their support and their contributions. We would also like to thank the Minister for the opportunity to undertake this challenge and for his patience in putting up with our frequent comments about the impossible task to be accomplished in such a short period of time.

WORKERS' COMPENSATION IN THE N.W.T.
REPORTS OF THE REVIEW COMMITTEE

PHASE I

October 1986

A. INTRODUCTION TO PHASE I

The N.W.T. legislation which established the Workers' Compensation Board was passed in 1977. As in other regimes across Canada, the philosophy was based on those in the Meredith Report, namely that an injured worker be compensated for income loss resulting from an injury incurred during the course of employment. It does not attempt to compensate for the full range of "damages" inflicted on a worker resulting from an injury. Neither does it allow employees to sue their employer in court for the full extent of their losses if they can prove negligence. In return for the guarantee of compensation regardless of negligence or fault, a worker's compensation was limited to loss of his income and the employer was obliged to pay the employee's premiums for the insurance scheme.

We would like to commend the past and current members of the N.W.T. Workers' Compensation Board for their desire and ability to comply with these concepts over the last decade.

We would also like to commend the current Board on undertaking research and initiating new data collection systems in response to our requests. We are in the fortunate position of working with a Board and their staff so desirous of review and improvement themselves that they are initiating changes even since our brief review has begun.

Our first task in Phase I of our review was to examine the Year's Maximum Assessable Remuneration. As can be appreciated, the YMAR level is at the very heart of the N.W.T. workers' compensation scheme. Not only is it the ceiling or maximum level at which injured workers could receive benefits and against which employers pay premiums, but in the N.W.T. it is also the basis for determining benefits to dependants of fatally injured workers. As Mr. Paul Weiler so aptly summarizes at pages 33-34 of *Reshaping Workers' Compensation for Ontario* (November, 1980):

> "Originally in 1913 the ceiling was fixed at $2,000, which more than covered the highest annual earnings of any industrial worker at the time (then assumed to be the railroad engineer earning $1,500 a year). Obviously the ceiling has subsequently dropped far below the peak of current industrial earnings. On the other hand, the statute originally limited the actual benefit to 55% of the worker's earnings. This percentage was raised to 66⅔% in 1920 and to 75% in 1950. Even more important, at the time workers' compensation was developed, Canadian workers did not pay income taxes. Now they do, and in accordance with a scale which is significantly progressive at the higher reaches of industrial earnings. But workers' compensation benefits, which can rise as high as $14,000 a year under the current legislation, are entirely non-taxable. This non-taxable feature of the benefit is inextricably intertwined with the issues of ceiling and the percentage."

Philosophically, the purpose of a workers' compensation scheme is to insure the income of a worker against loss as a result of personal injury incurred during the course of his/her employment. Legislation throughout Canada and other jurisdictions limits the amount of insurable income receivable by an injured worker as a percentage of his pre-injury income and also places a limit on the level of insurable income receivable by any worker.

The Review Committee feels that the present wording in the N.W.T. Act is inaccurate. By labeling the ceiling as the "Yearly Maximum Assessable Remuneration", one gets the impression that insurable benefits are limited by the amount employers are willing or obliged to pay as premiums. While this is true in one sense, the assessment levied on employers is a separate variable which can be changed by the Board at any time. We feel that the stress on maximum *assessable* remuneration in the current Act does not coincide with the rationale behind the legislation, maximum *insurable* remuneration. The committee did examine the possibility of defining YMAR and YMIR separately in the Act and the possibility of setting each of them at different rates. This has been done in Saskatchewan and B.C. with no detrimental effect. It was initiated in an attempt to increase the level of compensation payable to workers at the same time as freezing the maximum level for assessments to employers. Once these levels are set, the Board then sets the rates within the "assessable range" in order to meet its projected costs for the next year. While we were intrigued with this model, we rejected it in favor of retaining a single maximum level for the insurable income and assessments. We found that it is more equitable for all if the assessment premiums are based on the income loss that is being insured. Also, there is an inherent flaw in splitting the two maximum levels in that when the rate structure is applied, the employers of employees whose wages are below the maximum level end up subsidizing employees at or above the maximum level.

However, we did feel that the terminology in the Act should be changed to reflect the fact that it is the insurable income on which a limit is being placed. This does not bring about any change in practice, just an adjustment of terms to fit the principles behind the scheme. The definition of this term should be changed in the definition section of the Act (section 2) but the method by which the dollar amount is established and changed should be set out in a different part of the Act--possibly Part 4: Amount of Compensation.

RECOMMENDATION:

That section 2(e) of the Workers' Compensation Act be amended as follows:

a) the term "Year's Maximum Assessable Remuneration" should be amended to read "Year's Maximum Insurable Remuneration"; and

b) the words "and is equal to thirty thousand four hundred dollars effective as of July 1, 1985" should be deleted.

That sections 35 through 63(2) of the Act be amended accordingly.

B. MAXIMUM LEVEL OF INSURABLE INCOME

In determining compensation for loss of income, various legislatures have determined that there should be a limit on the level of income that should be insured. Consequently, all jurisdictions in Canada have established a year's maximum wage rate. Each jurisdiction arrives at that level by a different method and the actual amounts for 1986 vary from $48,000 to $19,000. Currently, the maximum in the N.W.T. is $30,400.

The policy of the N.W.T. Board has been to set their maximum at a level which would ensure that the earnings of 80 per cent of the workers would be covered. This method is achieved by multiplying the average "industrial aggregate wage" for the previous year by 120-125 per cent. Other jurisdictions attempt to cover the wages of 98 per cent of the employees while other jurisdictions just seem to select a number which will be politically acceptable.

In considering a new YMIR, the Review Committee reviewed whether there should be a maximum wage level and if so, the method of establishing it. We received a submission suggesting that the YMIR should be lifted entirely. In fact, this was recommended by the 1982 Review Commission in Alberta. However, it has not been accepted anywhere in Canada and the Alberta legislature declined the recommendation and chose to set a maximum of $40,000 in their Act.

On the other hand, we received several submissions that the YMAR not be increased. These requests came from employers who felt their assessment rates were the highest in Canada and did not want to see their costs increased. Employees all wanted to see the maximum insurable wage increased.

The Review Committee believes the maximum insurable wage (YMIR) should be increased but has not reached a conclusion on the rationale for setting that maximum, if any. We have found that statistics on the wages of employees in the N.W.T. are not reliable and that the Survey of Employment Payroll and Hours (S.E.P.H.) statistics do not include northern allowances in their wage base. We have found that the N.W.T. maximum wage rate has lagged behind the levels in other jurisdictions and behind the stated objectives of the Board. This has been acknowledged by the Board and has been in part because the original YMAR figure was set intentionally low at $14,500 in 1977. In that year the Accident Fund started at $911,000, and there was nervousness about the amount of compensation that could be paid out. As a result, subsequent boards have been playing "catch-up" in their attempts to increase the level to a sum comparable with other jurisdictions. These increases have been sporadic, and although there were no increases in 1980 or 1983, the average annual increase between 1978 and 1984 was over 10 percentage points.

The Review Committee has recently received a motion from the Workers' Compensation Board recommending that the YMAR be increased to $36,800 effective January 1, 1987. While the Review Committee lacks the necessary data information required to recommend a specific YMIR level, we do recommend that the current level be increased. Furthermore, we agree that the level recommended by the WCB is within their stated policy objective and as such is acceptable to the committee in the short term.

However, we would place two conditions on our endorsement of the WCB recommended level. Firstly, there should be no net increase in the overall cost of assessments to employers effective January 1, 1987. Corresponding with the rise in maximum wage levels, the assessment rates to employers have increased significantly over the last ten years. Increases in salaries and numbers in the work force, combined with increased YMIR levels, have resulted in substantial dollar volumes in relation to the work force covered and the number of claims reported. A healthy fund combined with high interest rates and high returns on investment have produced an admirable situation where pension reserves and future claims reserves are now fully funded and the contingency reserve fund is yielding a surplus. It is our understanding that this surplus will allow the Board to increase the YMIR by 21 per cent at the same time as maintaining assessment rates at a level which will not cause an increase in overall costs to employers.

The responsibility for setting these rates is entirely within the jurisdiction of the WCB. Consequently, we can only recommend to them through this report that they lower assessment rates to ensure no net increases to employers and that they rely on normal increases in assessable payroll volume, coupled with interest income, to produce the required income.

Secondly, benefits to widows and dependants are currently tied to the YMIR level. We would like to point out that elimination of or substantial increases in the YMIR would necessitate tying these benefits to wage rates or some other factor. We are not able to make recommendations on this point now because we have neither researched it nor informed the public that we would comment on it at this stage. However, we wish to highlight it because it must be addressed in the next round of amendments to the Act.

RECOMMENDATION:

That the N.W.T. Workers' Compensation Board initiate collection of data on the wages of workers in the N.W.T.

That the recommendation of the N.W.T. Workers' Compensation Board that the YMAR level be increased to $36,800 effective January 1, 1987, be accepted on the conditions that there be no net increase to employers in the overall cost of assessments and that the opportunity to amend the Act, if necessary, with respect to all benefits tied to the YMIR be ensured.

C. CHANGING THE LEVEL OF INSURABLE INCOME

Currently, the N.W.T. Workers' Compensation Act requires that changes to the maximum wage level (YMAR) be made by the Legislative Assembly's amending the legislation from time to time. Half of the jurisdictions in Canada have gone to a system whereby the YMIR level is adjusted automatically on an annual basis according to a formula in the Act. Some jurisdictions have chosen a base rate from which percentage changes are made annually based on changes to the Canadian Price Index, the Industrial Composite Wage Index or Survey of Employment, Payroll and Hours for the province or territory for the previous year, average wages of workers injured and receiving compensation in the previous year, or some blend of these indices. We do not agree that a base rate should be established from which percentage changes should be made, because the resulting relationship can go askew of the original base concept. We favor a formula that would be a new assessment annually, but because of our inability to obtain the necessary information in the time span allotted, we have not been able to reach consensus on the factors that should be used as components of this formula. The information we require is in the process of being tabulated and should be provided to us by mid July. We intend to recommend a formula which will address the northern situation fully in our Phase II report.

D. BENEFITS: PERCENTAGE OF NET OR GROSS INCOME?

In the N.W.T., disability benefits to an injured worker are calcula. on the basis of 75 per cent of gross income. However, at a certain point, the actual remuneration an injured worker is taking home from workers' compensation, as a percentage of his gross income, can be equal to or greater than his net take home pay (i.e., after deductions are made from his pay check).

The committee agrees that such a situation is not equitable to society. It invites abuse and mockery and provides no incentive to the worker to return to work.

The level of income at which this phenomenon occurs is dependent on the assessment levels in place for various social schemes (i.e., income tax, U.I.C., C.P.P., etc.). At present deduction levels in the N.W.T., that level is in the vicinity of $36,000 to $38,000 or near the vicinity of the recommended ceiling on insurable income.

The solution which has been followed in other jurisdictions is to calculate compensation benefits as a percentage of net income. All jurisdictions following this method set the insurable income level at 90 per cent of the pre-injury net income. The level of 90 per cent is chosen to conform with the intent of the scheme to compensate not the actual injury but the loss of income suffered by the worker as a result of the injury. We recommend that this same method be followed in the N.W.T.

We note that the recommendation of the WCB is also in favor of switching to 90 per cent of net but that they wish to wait a year and a half to do so. Based on the public response the Review Committee received, we would recommend that the switch take place as soon as possible.

Realizing that it would take an administrative adjustment, we contacted other jurisdictions which had already converted to this system. We found that the greatest problems were associated with defining the deductions which constitute net income. However, once these were determined, it was a straightforward task to establish the tables and then to change them on an annual basis.

In fact, the Alberta WCB, which was given only two months to implement the transition, stated that once they had their computer program in place, they could change their tables overnight if a new federal budget necessitated changes in income tax, C.P.P. or U.I.C. levels. Saskatchewan WCB stated that they were able to analyze, design, and program their new system in approximately five months, including two or three weeks to train their staff to enter the new system. Although there does not seem to be a standard table in universal use, the Boards we spoke with were more than willing to share their computer programs and to provide whatever assistance might be required. Our finding was that the task, based on experience in other jurisdictions, can be easily accomplished within six months.

RECOMMENDATION:

That the N.W.T. Workers' Compensation Board calculate benefits to injured workers on the basis of 90 per cent of net income effective January 1, 1987.

E. WHAT CONSTITUTES NET INCOME?

With respect to the deductions which should be used to constitute net income, the Review Committee is of the opinion that these factors should be set out in the legislation. We found that some Boards (Alberta) calculated income tax deductions by multiplying the basic deduction by one and a half, regardless of whether the injured employee had six dependants or none. Also, some Boards had the discretion of deciding what deductions, if any, would be used to calculate net income. Although they stayed with "social" deductions, they were contemplating "private" deductions such as alimony. The Review Committee felt that the deductions should be confined to the "social" deductions of income tax, C.P.P. and U.I.C. We refer to such a section in the *Saskatchewan Workers' Compensation Act* for reference:

"68. (1) Where injury to a worker results in a loss of earnings beyond the day of the injury, the board shall estimate the effect of the injury on the loss of earning capacity resulting from the injury and shall ensure compensation to the worker:

(a) in the case of a worker who sustains an injury prior to the date this clause comes into force, in an amount equal to 75 per cent of that estimate loss;

(b) in the case of a worker who sustains an injury on or after the date this clause comes into force, in an amount equal to 90 per cent of that estimated loss.

(2) Compensation pursuant to subsection (1) is payable as long as the loss of earning capacity continues or until the worker attains the age of 65, whichever occurs first.

(3) For the purposes of this Act, "earnings" means:

(a) in the case of a worker who sustains an injury prior to the date this subsection comes into force, his gross earnings from employment;

(b) in the case of a worker who sustains an injury on or after the date this subsection comes into force, his gross earnings from employment minus the probable deductions for:

(i) income tax payable by the worker calculated by using only his earnings from employment as his income and using only his basic personal exemption and exemption for dependants, as at the date of his injury and each anniversary date, as his deductions;

(ii) Canada Pension Plan premiums payable by the worker; and

(iii) unemployment insurance premiums payable by the worker.

(4) The board shall annually establish a schedule setting out a table of earnings for the purposes of clause (3)(b)."

RECOMMENDATION:

That net income be defined in the Act to include the gross income of a worker less his or her probable deductions for income tax, Canada Pension Plan premiums and unemployment insurance premiums.

TRANSITIONS

Since writing the report on Phase I four months ago, this committee has had the opportunity to become much more deeply immersed in the philosophy and operations of workers' compensation. Consequently, we have altered our thinking somewhat on some basic points.

Firstly, when we recommend in Phase I that pensions and benefits be calcualted on 90 per cent of net rather than 75 per cent of gross, we chose the percentage of 90 because that was the number used by every other jurisdiction in Canada. Upon reflection, however, we asked ourselves, "If the philosophy of workers' compensation is to replace wages lost as a result of injury incurred in the course of work, why should the total wage not be recovered? Why should the employee not receive 100 per cent of his pre-injury net income?" The immediate response offered was that a worker should not receive the same amount of pay when he is sitting at home with a broken leg as he would if he were actually on the job. It was suggested that this would cause abuse of the system. However, under the workers' compensation scheme, that argument is neutralized by the fact that it is the medical doctor and not the worker who decides when the employee can return to the workforce.

We also considered the historical roots of workers' compensation in the world of private insurance. Insurance schemes always have a deductible so that the full value of the interest being insured (whether it is a wage, car, boat or home) cannot be recovered. However, we have doubts about the carry over of that philosophy to this publicly legislated scheme.

This committee examined the impact of the loss of the 10 per cent from net income on injured workers and felt that the impact on workers at the lower end of the pay spectrum was onerous. Consequently, this Review Committee reached a compromise between the philosophically pure and the practical and socially acceptable: we have recommended that the pensions or benefits to injured employees, their spouses or dependants be calculated on 95 per cent of their pre-injury net income.

Furthermore, with respect to determination of inome, we recommend that care be taken to ensure it is defined as "taxable" income. With the upcoming change in the income tax laws covering northern allowances, any confusion about their inclusion should be clearly alleviated. (For more detail see chapter 4).

Lastly, this Review Committee has made several recommendations which, if followed, would create extensive changes from the current system. We feel that many of the recommendations are intertwined with each other and share the same underpinnings. Consequently, we would recommend that care be taken not to adopt partial changes on an ad hoc basis without consideration of the impacts on the remainder of the system.

WORKERS' COMPENSATION IN THE N.W.T.

REPORTS OF THE REVIEW COMMITTEE

PHASE II

October 1986

1. YEAR'S MAXIMUM INSURABLE REMUNERATION (YEAR'S MAXIMUM ASSESSABLE REMUNERATION)

Prior to looking a the YMIR (YMAR) levels, this committee considered whether there should be a maximum placed on the level of earnings that would be "insured" or "compensated" by the Act. We concluded that a ceiling was necessary in order to prevent fraud or anomalous situations where persons with earnings at the top end of the spectrum were receiving exorbitantly high levels of compensation.

We found the maximum levels in other jurisdictions and the method of amending those levels to be as follows:

Jurisdiction	$	Method of Change
B.C.	40,000	Escalation by CPI applied to benefits
Alberta	40,000	Ad hoc
Saskatchewan	48,000	Escalation by average of workers injured ($34,000 YMAR)
Manitoba	31,000	Escalation by average of workers injured
Ontario	32,100	Cost of Living Index for benefits
Quebec	34,500	Industrial Composite escalation
New Brunswick	30,700	Provincial Industrial Aggregate
Nova Scotia	28,000	CPI escalation
P.E.I.	19,000	Ad hoc
Newfoundland	45,500	Ad hoc
Yukon	31,400	Ad hoc
N.W.T.	30,400	Increasing to $36,800 January 1, 1987 ad hoc

When we tried to discover the rationale for setting the maximum at a certain level, we found that historically the attempt has been to cover the full wages of 80 per cent of the workers in the N.W.T. However, throughout Canada, the application of this philosophy seems to vary from province to province. In Saskatchewan and Newfoundland well over 90 per cent of the workers would have their wages covered in full.

In our attempts to establish the range of wages in the N.W.T. we found that such a figure is very difficult to come by, if at all. The Workers' Compensation Board does not normally keep track of salaries in excess of the current YMIR (YMAR), the Industrial Wage Index does not correlate well for conditions in the North and S.E.P.H. is not regarded as reliable. Consequently, we were tempted to look at the wages of those workers who had actually been injured during the previous year. The N.W.T. Workers' Compensation Board compiled the following data on the 1,155 time loss claims for 1985:

1. The highest annual earnings of any claimant were $83,200.
2. Only four claimants had annual earnings exceeding $68,000.
3. Claimants below the existing YMIR of $30,400 were 775 or 67 per cent.
4. Claimants below the proposed YMIR of $36,800 were 1005 or 87 per cent.
5. Claimants below the theoretical YMIR of $40,000 were 1080 or 94 per cent.
6. Claimants below the Saskatchewan YMIR of $48,000 (highest YMIR in Canada) were 98 per cent.

The proposed 1987 YMIR of $36,800 is a move in the right direction. With this substantial increase over present YMIR of some 21 per cent it would be prudent to allow Workers' Compensation Board staff to analyze the effects it has on assessments and benefits before increasing YMIR again.

Therefore, this Review Committee recommends:

- ***that a ceiling on insurable earnings be maintained (YMIR) in order to guard against possible abuse;***
- ***that further increases in the ceiling on insurable earnings be contemplated with a move to a YMIR of approximately $45,000 within the next two years;***
- ***that the Workers' Compensation Board staff keep accurate records on the full salaries of injured claimants for the purpose of determining the percentage of claimants fully covered by the workers' compensation scheme;***
- ***that a formula be used to determine YMIR and that the formula ensure that 95 per cent of the N.W.T. wage earners are at or below YMIR. This figure should be adjusted annually, rounded off to the nearest one hundred dollars;***
- ***that the formula for setting YMIR should be based on S.E.P.H. figures and should be adjusted annually by the Board;***
- ***that before the new YMIR figure is set each year, the figure based on S.E.P.H. should be checked against the wages of claimants in the previous year to ensure the goal of attaining coverage of the wages of 95 per cent of the workers is met; and***
- ***that the Board be given the authority to alter the YMIR effective January 1, 1988, and that the automatic formula be put in place effective January 1, 1989.***

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2. SEASONAL COVERAGE

Section 39 of the N.W.T. Workers' Compensation Act states, in part, "the average monthly remuneration shall not exceed one-twelfth of the Year's Maximum Assessable Remuneration". None of the other jurisdictions use similar wording but all would *seem* to prohibit payments for temporary disabilities in excess of rates proportional to YMIR.

YMIR (YMAR) is designed for application on a year round basis. Consequently assessments on seasonal workers are high in proporation to benefits because section 39(1) limits benefits to one-twelfth YMAR. For example, based on the Act prior to 1986, if an employee works for six months at a salary rate of $6,000 per month, his employer would pay the maximum assessment currently rated on $30,400. However, the employee injured one month into the season would draw only 75 per cent of $2,533.33. Consequently, $2,533.33 of that worker's monthly salary, on which his employer has paid assessments, is not in fact covered.

When it comes to seasonal workers, the N.W.T. is unique. It has a proportionally high number of resident seasonal and non-resident seasonal workers. Employment sectors affected include:

1. Tourism, hospitality, lodges;
2. Mining (exploration in particular);
3. Oil and gas exploration;
4. Construction;
5. Transportation - barges, trucking, air in relation to other seasonal categories such as mining and tourism;
6. Trades, in relation to other seasonal categories; and
7. Government, in relation to the above categories.

We saw the alternatives to this inequity as being:

1. To collect assessments and pay benefits on a monthly basis. (Change *yearly* maximum insurance remuneration to *monthly* maximum insurable remuneration);

2. To eliminate the maximum monthly provision. (Problem: Could be abused by seasonal high salaried worker who switches to full time work after injury); or

3. To have Board administration review the claim of an injured seasonal worker at the end of the year and increase payment if justified.

We believe that the preferred alternative is to permit Workers' Compensation Board staff the discretion to upgrade a worker's benefits at the end of the calendar year.

Therefore, this Review Committee recommends:

- ***that section 39 of the Act be amended to allow the Board the discretion to upgrade a worker's benefits at the end of the calendar year.***

3. PENSIONS AND BENEFITS TIED TO YEAR'S MAXIMUM INSURABLE REMUNERATION

DEATH BENEFITS

No other jurisdiction uses YMIR in calculating benefits. We recommend that the N.W.T. adopt a benefit system based on the salary of the worker, up to the YMIR maximum. A minimum amount should be established to ensure that lower scale workers and dependants are adequately cared for.

Present legislation specifies monthly spouse's pensions at 2.75 per cent of YMIR and dependants' monthly pensions at five-eighths of one per cent. It is obvious, even with the proposed increase in YMIR, that spousal and dependants' allowances are very low. The attached Table 1 shows the relationship of some sample cases.

Many jusirdictions follow the principle that spouse's and dependant's pensions should be equivalent to the total disability pension a worker would receive. We believe this to be correct and recommend that the N.W.T. adopt this system.

Obviously, the wide variety of circumstances affecting dependants creates an equally wide number of problems for Workers' Compensation Boards to deal with. The provinces have attempted to deal with the issues in a variety of ways, and the comparative results are a wide hodgepodge of regulations. In our examination of other jurisdictions, we concluded that Saskatchewan's system appeared to be the closest to a fair system for the N.W.T. The Review Committee recommends:

- ***that the present calculation of dependants' pensions be unhinged from YMIR and be tied to a percentage of the deceased worker's wage equivalent to the percentage of wage used for total disabilities which, based on our recommendations, would be 95 per cent;***

- ***that the pension to dependants of a deceased worker be paid for a period of time and that the Board have the discretion as to whether that pension should be increased, decreased or terminated. the presumption would be that a dependant's pension would continue but would be subject to review on a regular basis. The Board would have the discretion to alter the pension after consideration of the pensioner's need. Criteria for such a determination would be similar to those used for permanent partial disabilities and would include age of dependant, marital status, family circumstances, employment, employability, ability to adapt, education, qualifications and any other factors the Board may deem relevant. If the board decides to terminate a spouse's pen-***

sion because of remarriage, they shall consider whether and in what amount to issue a lump sum payment;

- ***that the pension to dependants of a deceased worker be paid on behalf of the family unit and not be divided into separate pensions for the spouse and each dependant. The pension of 95 per cent of the net income of the deceased worker shall be paid to the family unit regardless of whether that unit consists of a spouse or a spouse with one or more dependants.***

Our committee has reached full agreement on some other aspects of this very important matter. A summary of those related issues and recommendations is as follows:

1. Transportation of Body

   At present, such transportation is only paid within the N.W.T. even if the body is sent elsewhere. We recommend:

   - ***full transportation costs of the body of the deceased worker be paid to any point in Canada.***

2. Burial Costs

   Average funeral costs in Yellowknife for a modest funeral approximate $2,500. Other communities may be substantially lower but, depending on the dependants' wishes, may be much higher. We suggest the figure of $2,500, reviewable from time to time, is reasonable. We also suggest that this figure might well be included in a lump sum payment as described below. This Review Committee recommends:

   - ***that a lump sum payment of $2,500 be paid to the deceased worker's family for burial costs or, if there is no surviving family, the actual burial costs be paid up to a maximum of $2,500.***

3. Lump Sum Payment on Death of Worker

   That the death of a worker causes untold hardship and disruption to the worker's family is indisputable. The monetary cost of that disruption, of course, varies with each individual instance. We recognize that life insurance or death benefits in some circumstances will provide a cushion, but we believe that a substantial lump sum payment by the Workers' Compensation Board is justifiable and proper. We have considered the desirability of relating that sum to the size and age of the worker's surviving family. This committee recommends:

   - ***a lump sum payment of one year's salary of the deceased worker to a maximum of YMIR and a minimum of $5,000 be paid to the spouse or, if no surviving spouse, then to be held in trust for dependent children until age 21.***

4. Reducing Pension Scales

   Some jurisdictions reduce pensions after a period of time, or as the surviving spouse increases earning skills, or variations thereof. Having regard to the complications in administering such schemes and the low number of spousal pensions in the N.W.T., we recommend:

   - ***that such a plan not be adopted in the N.W.T.***

5. Termination or Continuance of Spousal Pensions

   Under present N.W.T. legislation, pensions to dependants continue until the recipient spouse dies and until the surviving children either reach 16 or finish higher education. In many other jurisdictions, spousal pensions terminate at or shortly after age 65. This Review Committee recommends:

   - ***that spousal pensions be indexed to other income and that they continue after the spouse's normal retirement age.***

6. Minimum Pensions

   The Review Committee recommends:

   - ***that pensions to spouses should not be less than $1,000 per month and should be subject to increases from time to time.***

DISABILITY COMPENSATION

The move toward 90 per cent of net income rather than 75 per cent of gross in order to establish disability compensation is a standard to which most provinces are moving and one which the N.W.T. is to adopt shortly. We certainly accept net income as the income on which pensions should be based, but we have serious concerns as to whether a pension for total disability should be less than 100 per cent of net income.

A compelling argument is put forth to the effect that it is medical opinion that determines when a worker should return to work, not the employee's discretion, and therefore, no incentive to return to work should be needed. In fact, a large portion of N.W.T. workers' salaries are fully covered by sick leave or other employer benefits. However, the belief that "a worker should not receive benefits from compensation at the same rate as his salary" is strongly entrenched.

It is our opinion that, for workers at the lower end of the pay spectrum in particular, a 10 per cent loss in take home pay is an excessive penalty. If the "deductible" principle is to be retained, we recommend a 5 per cent reduction only. Table 1 and Table 2 illustrate some hypothetical cases. The Review Committee recommends:

- ***that no more than a 5 per cent reduction of net wage be imposed on total disability pensions.***

A new minimum total disability pension set somewhat above the minimum wage in force at the time should be established. We note that nursing home care or its equivalent cost is covered by the Workers' Compensation Board. It would also be prudent to give the Board the discretion to provide additional benefits in necessitous circumstances. This Review Committee recommends:

– ***that the minimum level of total disability pensions be not less than the net amount of $1,000 per month, that this amount be subject to increases from time to time and that the pension amount be subject to Board review in cases of undue hardship.***

Waiting Period

N.W.T. legislation excludes compensation on the day of the injury if the worker is only disabled that day. We believe this should be altered to have the employer continue the worker's regular time salary for the day of the injury, unless the employee refuses to provide medical varification of the disabling injury. As discussed in chapter 8, we recommend that accidents need not be reported if the disabling injury does not extend beyond the day of the injury or if no long-term effects are anticipated. This committee recommends:

– ***that the employer pay regular salary for the day of the injury.***

Transportation

Transportation of the injured worker to obtain medical attention is the responsibility of the employer. In some remote workplaces, the cost of medical evacuations can be a major expense to the employer. This Review Committee recommends:

– ***that air transportation for an injured worker, authorized by medical personnel, be paid for by the Worker's Compensation Board.***

PERMANENT PARTIAL DISABILITIES

Concern has been expressed about estimating the degree of partial disability in relation to an individual worker's circumstance. Flexibility to make this determination is given to the Board by current legislation but it is desirable to clarify the criteria which the Board should consider. In determining the degree of partial disability, it is essential that not only the injury be considered but the many other circumstances of the worker including age, education, qualifications, physical condition, ability to adapt, family circumstances, et cetera. Therefore, this Review Committee recommends:

– ***that the Act set out the criteria which the Board should consider in determining the degree of partial disability of an injured worker and that the criteria include the employee's age, education, qualifications, overall physical condition, ability to adapt, family circumstances, nature of the disability in relation to the work performed, and any other factors the Board may deem relevant.***

INDEXING PENSIONS

This Review Committee recommends:

– ***that pre-1977 pensions be updated to current levels, that ceilings on pensions be adjusted to current YMIR levels and that pensions be indexed to the cost of living.***

4. NORTHERN AND HOUSING ALLOWANCES

It is a well known fact that a major percentage of employees in the Northwest Territories receive a northern or housing allowance package which is paid over and above regular wage structures.

Up until 1986 these northern allowances were not considered part of an employee's wage and were virtually a non-taxable benefit, but in 1987 housing allowances will become taxable by order of the Government of Canada.

This system of benefits is totally unique to workers in northern communities and is used as an enticement by employers to help them attract the professional and experienced employees they require.

The idea of northern benefits is an attempt by the employer (usually negotiated at a union-management level) to offset the hardships of climate and isolation endured by the northern worker. It is also used in an attempt to cope with the high cost of living and to provide employees with a lifestyle comparable to that expected in more southern and developed areas of Canada.

In the majority of cases employers do not include northern allowances as part of the wage package when reporting to the Workers' Compensation Board for assessment purposes. This situation could feasibly create a patent imbalance of payments to workers who claim a compensable injury.

On the other hand, our research has shown that the majority of employers continue northern allowances to workers who are on compensation and are still classed as an employee.

The Workers' Compensation Board itself admittedly only considers northern allowances where an employee who has processed a claim has a wage level below the present YMIR figure. In such a case, the Workers' Compensation Board will adjust it accordingly and will provide "top-off" payments by including northern allowances as part of the worker's income.

Although no other province or territory in Canada has yet addressed the issue of northern allowances, it is a subject that has received serious consideration from this committee.

The possibility of inequities to workers is expansive and one example could be as follows:

– worker's wages as assessed = above YMIR
– northern allowances (housing) = $450 per month
– compensation payments = 90 per cent of net pay up to YMIR.
– employer cuts off northern allowance while on compensation

The result of this is that the worker will receive a percentage of net take home pay of less than 90 per cent of the figure he would have received if working, but he has also suffered the loss of $450 per month housing allowance with no opportunity to recover it while on compensation.

Table 1

MONTHLY BENEFITS

(Worker, married with 2 dependants under 16)

Annual Salary (YMIR)	Monthly Gross Income	Estimated Take Home Pay	75% Gross Total Dis.	90% Net Total Dis.	95% Net Total Dis.	Widow's Pen. 2.75% Annual Salary	Dependant's Pen. 5/8 of 1% An. Sal.
45,000	3750.00	2790.72	2812.50	2511.65	2651.18	1237.50	281.25
36,800	3066.67	2367.13	2300.00	2130.42	2248.77	*1012.00	*230.00
30,400	2533.33	2010.76	1900.00	1809.68	1910.22	836.00	190.00
24,000	2000.00	1650.10	1500.00	1485.09	1567.60	660.00	150.00
18,000	1500.00	1301.55	1125.00	1171.40	1236.47	495.00	112.50
12,000	1000.00	940.00	750.00	846.00	893.00	330.00	75.00
10,400	866.67	831.40	650.00	748.26	789.83	286.00	65.00

(*Under present legislation ALL pensions will be pegged at this amount with new YMIR)

Table 2

MONTHLY BENEFITS

(Single Worker)

Annual Salary (YMIR)	Monthly Gross Income	Estimated Take Home Pay	75% Gross Total Dis.	90% Net Total Dis.	95% Net Total Dis.
45,000	3750.00	2629.37	2812.50	2366.43	2497.90
36,800	3066.67	2223.58	2300.00	2001.22	2112.40
30,400	2533.33	1877.41	1900.00	1689.67	1783.54
24,000	2000.00	1535.95	1500.00	1382.36	1459.15
18,000	1500.00	1193.20	1125.00	1073.88	1133.54
12,000	1000.00	841.80	750.00	757.62	799.71
10,400	866.67	747.50	650.00	672.75	710.13

($10,400 per year represents a minimum wage of $5.00 per hour.)

This added monetary loss would put a worker and his family in an extremely difficult financial position and could very well mean that over 50 per cent of his compensation payments must be diverted to paying for housing and accommodation, expenses usually offset by northern allowances.

The committee has considered many different ways of tackling this problem, but since all northern allowances are set at different rates by individual employer groups, it can become highly complicated and nearly impossible to deal with on an individual claimant level.

Therefore, the committee recommends:

- ***that the Workers' Compensation Act and possibly the Labour Standards Act be amended to make it mandatory for all employers to continue providing northern allowances to any worker who is on compensation and is still in their employ.***

5. CLOTHING ALLOWANCE

As it presently stands, the Workers' Compensation Board will, upon application, pay an allowance to a claimant of up to "$100.00 per year for the replacement or repair of clothing worn or damaged by reason of the wearing of an upper or lower limb prosthesis or appliance supplied by the Board".

Also, the Board may pay the costs of replacing or repairing any article of clothing which has been damaged or destroyed as a result of a compensable accident.

Although this committee has not received an abundance of submissions in this area, we do feel that it is a section of the Act that has been overlooked for many years and has never been adjusted to compensate for the increases in the cost of living in the N.W.T.

It is our opinion that the figure of $100.00 per year as a clothing allowance for permanently disabled workers who may need alterations, refitting or replacement of articles of clothing, is not reasonable in 1986. We felt that removing any mention of a dollar value from section 49(1) of the Act was a just and reasonable way

to treat permanently disabled pensioners and would be equal to the treatment of non-pensioners as stated in section 49(2).

However, we were concerned that this might open the Act up to possible abuse of the clothing allowance provisions and might lead to the discontinuation of this much needed program.

We, therefore, recommend:

- ***the removal of the words "on application of a worker" from section 49(1);***
- ***the removal of the maximum yearly dollar value as stated in section 49(1) of the Act; and***
- ***inclusion of "Board discretion".***

We would suggest that the Board's discretion be based upon a quarterly replacement of clothing.

This would also eliminate the problem of an annual adjustment for clothing allowance based upon cost of living, and could be fully workable for both increases and decreases in the retail market place.

6. JURISDICTION OF THE BOARD

Under each piece of legislation, a Workers' Compensation Board is given the exclusive jurisdiction to examine, inquire into, hear and determine a number of issues. In making comparisons with the legislation of the provinces, the Review Committee found that section 8(2) pertaining to jurisdiction should be amended to improve the wording or increase the scope of matters the Board is authorized to determine. Therefore, this Review Committee recommends:

- ***that the Act be amended to provide the Board with the authority to determine:***
  - ***whether any personal injury or death for which compensation is being claimed has arisen out of or in the course of employment within the meaning of the Act (new section);***
  - ***whether personal injury or death has been caused by accident (a replacement for section 8(2)(a));***
  - ***the permanence or anticipated duration of disability by reason of accident (a replacement for section 8(2)(c));***
  - ***the existence of the relationship of any member of the family and the degree of dependency (a replacement for section 8(2)(f) and (g));***
  - ***whether a person is a worker, sub-contractor, contractor or employer within the meaning of this Act (a replacement for section 8(2)(j));***
  - ***whether any particular disease is peculiar to or characteristic of any particular industrial process, trade, or occupation to which this Act applies (new); and***
  - ***the character of any industry, employment, establishment or department and the class to which such industry, employment, establishment or department should be assigned.***

In line with these recommendations, section 8(2)(a), (c), (f), (g) and (j) should be deleted. Each province's legislation has set out the types of activities to which the Workers' Compensation Board legislation applies. Some provinces set out all the industries or activities in a schedule to the Act while others cover all workers within that province's jurisdiction unless otherwise exempted by the Act or regulations. The approach in the N.W.T. legislation is the latter type. Most jurisdictions also give persons who are specifically exempted from coverage the opportunity to apply for and obtain approval from the Board for coverage.

While this committee would not alter exemptions listed in section 10, we feel that consideration should be given to persons injured in the course of hunting, trapping and fishing. Other jurisdictions such as British Columbia and Nova Scotia recognize commercial fishermen for the purpose of compensation claims. These persons either pay the assessments themselves or the Board attempts to levy assessments against recipients and buyers of fish and masters of fishing vessels (see British Columbia legislation section 4). The Quebec Act allows independent operators and domestics to organize and register as associations.

This Review Committee feels that similar types of provisions could be inserted in the N.W.T. Act to extend the option of coverage to hunters, trappers or fishermen carrying on traditional pursuits on a commercial basis in the N.W.T. Therefore, this Review Committee recommends:

- ***that in consultation with Hunters and Trappers Associations, Fishermen's Associations and other pertinent agencies, full consideration be given to extending workers' compensation coverage to hunters, trappers and fishermen on a self-coverage or an individual or group basis.***

7. COMPOSITION AND RESPONSIBILITIES OF THE BOARD

Currently, the Workers' Compensation Board of the N.W.T. has (or has the potential to have) twelve Board members. Most other jurisdictions in Canada have three and at most five members. While there has been political pressure to reflect the Regional makeup and concerns of the N.W.T. on the Board, we also see the need to have a more streamlined working Board. Not only would a smaller Board reduce costs of administration and provide more flexibility in arranging for meetings, but it would also provide more effective management. With a smaller number, Board members wouild stand a better chance of personally taking responsibility for giving direction to a large staff, for exercising a trustee relationship in relation to the Accident Fund, for managing the moneys in the Accident Fund and for determining people's rights in a fair manner.

Therefore, this Review Committee recommends:

- ***that the number of members on the Workers' Compensation Board be reduced.***

Unfortunately, we were unable to reach consensus on the optimum size of the Board. One member feels that the territorial Board should reflect the cultural uniqueness of its jurisdiction in addition to ensuring distinct representation of employers and employees from the industrial sector. That member suggests a seven person board while another member suggests these elements plus the efficiencies and responsibilities mentioned above could be accomplished by a Board of five persons. The third member of our committee feels that the polarity characterizing employer/employee relations dissipates when representatives are working together on an issue and that the conflict between these sectors is more perceived than real. That member feels that the Board should be going in the direction of stronger "hands on" control and more effective leadership and that the number of people who can best work together to achieve this is three. A quorum should be a simple majority of the number of appointments to the Board at any given time.

The Review Committee did agree on the term of Board members and recommends:

- ***that the chairperson be appointed by the Commissioner-in-Council on a full-time salaried basis for a term of five years, subject to review and reappointment;***

- ***that the members be appointed by the Commissioner-in-Council on a part-time basis for a term of three years, subject to review and reappointment;***

- ***that the chairperson have a neutral background concerning employer/employee relations; and***

- ***that the members appointed not be Workers' Compensation Board staff or public service employees and that they represent an equal balance between employers and employees.***

Given the relatively close network of institutions and people in the N.W.T., we felt it would be wise if the Workers' Compensation Board developed a conflict of interest policy to cover situations where a Board member is determining the rights of an appellant where the Board member is a member of the same union local or an officer or employee of the company. Neither should Board members have any overlap of financial interests between their personal affairs and investments of the Board. Therefore, this Review Committee recommends:

- ***that the Board develop a policy such that Board members do not determine matters where they have a real or perceived conflict of interest.***

The two key areas of responsibility which must be exercised by the Board are management of the Accident Fund (referred to in chapters 11 and 12) and policy concerning people's rights to compensation or adjusted assessments. In chapter 10 we have stressed the need for the Board members to reduce their dependency on the actuary and to take more direct control over the management and investment of the fund. This committee feels strongly that the role of the Board should clearly be that of trustee to each reserve and account within the Accident Fund as well as to the Accident Fund as a whole. This means that Board members should receive more intense training on the relatively complex duties and liabilities of a trustee. They should also be thoroughly conversant with the operation of the Workers' Compensation Board, appeal process and procedure and the duties and liabilities of a director. This will entail considerably more time than is currently spent on familiarization type sessions for the Board.

Therefore, this Review Committee recommends:

- ***that the Workers' Compensation Act be amended to state that the role of Workers' Compensation Board members is one of trustee to the Accident Fund and all its constituent accounts; and***

- ***that the Board receive training on the role and duties of a director and of a trustee, familiarization with operation of all facets of the Board, and briefing on the legal principles involved with appeal procedures.***

8. OPERATION AND ADMINISTRATION OF THE WORKERS' COMPENSATION BOARD

Both the government and the Board have the responsibility to the employers who fund the Board's operation and to the beneficiaries of the Accident Fund to provide as efficient an administration as possible. It is obvious to the Review Committee that administration costs of the N.W.T. Workers' Compensation Board are far higher than can be justified. By way of illustration we mention the following points:

- In 1977 the Workers' Compensation Board processed 2,265 claims and administration costs totalled $728,000, or $321.41 per claim.

- In 1985 the Workers' Compensation Board processed 3,419 claims and administration costs grew to $4,223,000, or $1,234.16 per claim.

- In 1985 the New Brunswick reported administration costs only slightly higher than the N.W.T.'s at $4,389,500, but they processed 30,654 claims at a average cost of $143.20.

- The smallest jurisdiction in terms of population and claims, Yukon, processed 1,029 claims in 1984 (less than one third of the N.W.T.'s) but their administration cost only $751,000 or $729.83 per claim.

The Review Committee did not do an in-depth study of the administrative effectiveness of the Workers' Compensation Board. However, some of the factors that we believe contributed to the situation include the following:

- There has been a definite lack of effective leadership from the Board. With very little direction or initiative emanating from

Board members, senior administration appears to have been put in the difficult position of providing guidance to the Board as well as filling their primary role as administrators.

- An overreliance on outside advice, in particular that of the actuary, has developed. Administration staff must strengthen their ability and confidence to perform independently.

- Bureaucratic complacency, stemming from the confidence in a large, healthy Accident Fund, is a factor. Without a fiscal need to tighten costs there has been a lapse in controls.

We have perceived an effort being made toward improving the situation. Certainly recent criticism of high administration costs and the very fact that this Review Committee has been assembled has produced an impetus to improve in many areas.

However, we believe that more concentrated efforts are essential to reduce unnecessary costs. These efforts should include assistance from outside the Workers' Compensation Board. The Review Committee recommends that:

- ***an in-depth analysis of administrative procedures be performed by an independent and competent consultant who will work with senior management and the Board in developing an efficient administration.***

As many as two-thirds of claims processed fall into the "no time loss" category. In other words, they are of a minor nature and do not involve loss of salary to the worker. We believe that significant savings could be realized without jeopardizing workers if the only accidents to be reported were those involving lost time (beyond the day of the injury) or those that might result in permanent harm to the worker's health. Therefore, the Review Committee recommends that:

- ***employers keep injured workers on regular salary the day of an accident and that only accidents involving time lost beyond the day of the injury or involving permanent or recurring harm be reported.***

9. ROLE OF THE ACTUARY

During the course of our review, we found the current consulting actuary to be helpful, informative and competent. The Accident Fund has flourished during the several years he has played an advsory role to the Board. However, we found that because he had been with the Board since its inception and because proper management of the fund through its various stages of growth has proven complex, the Board has developed a strong dependence on the opinion of this one person.

This Review Committee recommends:

- ***that all members of the Workers' Compensation Board spend intensive sessions familiarizing themselves with the nature, purpose, function and operation of the fund and its various underwriting units and begin to decrease their reliance on the actuary;***

- ***that the actual preparation of primary data should be the responsibility of the Board; and***

- ***that the appointment of the actuary be reviewed by the Board every three years.***

We feel that the specific role of the actuary should be set out in the Workers' Compensation Act. Therefore, this Review Committee recommends that:

- ***the role of the actuary should ultimately be reduced to:***

  a) evaluating the Board's long-term liabilities, including pension fund liabilities, at least every three years;

  b) evaluating the Board's estimated costs of increases in benefits as required;

  c) evaluating the Board's short-term liabilities (i.e., continuing claims) as required;

  d) evaluating and estimating reserves for contingencies, operating and established claims on an annual basis;

  e) evaluating the annual assessment rates already determined by the Board.

10. APPEAL PROCESS

Decisions which are made by the Workers' Compensation Board or their staff that are subject to appeal include employer assessments and employee compensation awards. Initial determination of these issues is made by the assessment officer or the claims officer, respectively. According to the current N.W.T. legislation, if an employer or a claimant submits a written request that this decision be reviewed, the Board is obliged to appoint a review committee to review the record of the claim for compensation or assessment. This committee may confirm, vary or reverse the adjudicator's original determination. Their decision can, in turn, be appealed to the Board.

In practice, we were told that there are, on average, fewer than 30 appeals a year and that they go directly to the Board. Apparently, a review committee has not been struck during the last seven years, if ever. This Review Committee received submissions and reviewed legislation and practices from other jurisdictions regarding the establishment of a permanent independent workers' compensation appeal board. While there is public support for an independent appeal process, there is not enough volume to merit creation of a separate board and we would not recommend that one be created in the N.W.T. Neither would we recommend the creation of ad hoc committees to hear appeals from time to time because they lack the background knowledge, continuity, expertise and independent administrative support.

However, we are concerned about public opinion on the independence of the appeals. Under the current wording of the Act, there is the perception that the appeals review committees are not independent of the Workers' Compensation Board and that they

might even be made up of Board members who might in turn sit on a later appeal of the same matter. There is the further perception by the public that the Board is not that objective when it comes to reviewing decisions of its own staff.

This Review Committee recommends:

- ***that the Board start exercising the provision for the appeals review committee set out in section 24 of the Act.***

However, the composition and scope of this committee should be clarified. This Review Committee recommends:

- ***that the appeals review committee be composed of three people who are not members or staff of the Workers' Compensation Board;***
- ***that the chairperson be chosen for his/her independence and for a term of three years and the other two members serve for a two year term, one representing employees, the other representing employers;***
- ***that an alternate be delegated for each of the latter two committee members in preparation for conflict of interest with appellants, travel or illness;***
- ***that the persons appointed to these positions would receive orientation in appeals and Workers' Compensation Board procedure and would be required on an as-needed basis;***
- ***that the appeals review committee have the authority to consult independent experts, be they medical or otherwise;***
- ***that interested parties have access to information on the record (see chapter 19) and all costs should be paid from the Accident Fund; and***
- ***that the decision of the appeals review committee be subject to appeal by the applicant (worker or employer) to the Board.***

This Review Committee feels that implementation of this appeals review committee would work well with the streamlined Board recommended in chapter 7.

Upon closer examination of section 8 of the Act, which states that actions or decisions of the Board are final and are not open to question or review by a court except where there has ben a denial of natural justice or an excess of jurisdiction by the Board, the Review Committee found that the courts regularly ignore this type of provision. Courts find this "privative clause" irrelevant in at least two instances:

a) Courts will ignore this clause where a tribunal exceeds or fails to properly exercise its jurisdiction, makes a decision on a question of law that is patently unreasonable, makes a decision based on no evidence or an unreasonable decision based on some evidence, irrelevant matters or collateral issues. [Roger Carter, Q.C., "The Privative Clause in Canadian Administrative Law, 1944-1985; A Doctrinal Examination" (1986), 64 Canadian Bar Review, pages 241-282.]

b) Section 96 of the Canadian Constitution gives the federal government the jurisdiction to appoint judges of the superior courts. This has been interpreted as prohibiting a province from denying "to the superior courts power to review and determine finally the scope of statutory and common-law powers conferred on provincial government officials or on provincial minor courts or non-curial tribunals". [W.D. Lederman, "The Independence of the Judiciary" (1956), 34 Canadian Bar Review, 1139, page 1174 as quoted in Carter above, page 278.]

Therefore, this Review Committee recommends that:

- ***that portion of section 8 which constitutes a privative clause be deleted because it is becoming increasingly meaningless and misleading to the public;***
- ***the Act specifically allow recourse to the courts from a decision of the Board; and***
- ***the court have the discretion in determining whether costs be paid from the Accident Fund; and***
- ***the appeal review committee and the Board be required by the Act to forward to the appellant their written reasons for their decision.***

11. AUTONOMY OF FUND AND ACCOUNTABILITY OF THE BOARD

Currently the Accident Fund as well as any investments or interest earned therefrom are under the authority of the Workers' Compensation Board. We suggest that they stay this way. The fund should not be made part of the Consolidated Revenue Fund of the Government of the N.W.T. and attempts by any department of the Government of the N.W.T. to gain access to or to encroach on any moneys within this fund should be discouraged. The reason for this, of course, is that these funds are essentially pension funds of one type or another and must be treated as moneys being held in trust for existing or future claimants. It is the Board that is the trustee of the fund, a role which is a formal one covered by the Trustee Act of the N.W.T. and centuries of common law. Therefore, this Review Committee recommends:

- ***that the Workers' Compensation Act be amended to state clearly that the Accident Fund is one indivisible fund which is held in trust by the Workers' Compensation Board for the payment of benefits and expenses of administration under this Act.***

Although the Accident Fund is a single indivisible entity, it has been and should continue to be allocated to separate accounts for the liabilities which the Board must cover. Moneys in these separate accounts have been invested so that they mature when the liabilities become payable. This committee found that there was general misunderstanding by the public about these different accounts,

especially the future claims and the contingency reserve. Indeed, the committee found that no recent policy had been developed to determine just how much money was enough for contingencies. It is important to note that the Accident Fund has matured impressively during the last ten years. It has grown from less than one million dollars in 1977 to over 70 million dollars at the end of 1985. The enclosed graphs on page 37 illustrate the performance of the reserves.

We were also surprised to discover that this year marks the first time an update has been done on the calculations for the future claims fund. The actuary and chairman have recommended that the underwriting units, reserve funds and pension funds be prescribed in legislation. We feel the creation of these reserve units are better left a policy decision of the Board. However, we support those recommendations in principle and for convenience repeat them here.

Firstly, the Board, through its actuary, recommends the separation of the Accident Fund into two main reserves: one for operations and one for contingencies. The operating reserve would cover all pensions and administration expenses. The contingency reserve would cover unexpected disasters of a relatively large scale.

With respect to the contingency reserve, the difficulty experienced by the public was the unabated growth of the fund without any perceived cap-off point. Several intervenors felt that the contingency fund was large enough already and that, rather than continue to make hefty contributions to it, premiums should be reduced accordingly. This committee agrees that the total amount of money required for contingencies should be determined and that once that level has been achieved and for as long as the fund is at that level, the Board should no longer levy assessments against employers for contributions to that fund. The method of setting the upper limit on this reserve that was suggested was the sum of the previous years' incurred claims plus the previous years' administrative costs.

This committee feels that the method described does not relate in any way to the costs of a theoretical disaster. We have some doubt that the Workers' Compensation Board should undertake to fully fund (i.e., pay pensioners for the year of accident plus all foreseeable future years) a large scale disaster. We suggest that the Board explore alternative models for calculation.

With respect to the operations reserve, it would have three components with identifiable financial limits:

- administration costs;
- post-1977 pensions or established claims; and
- pre-1977 pensions.

Costs for administration are straightforward in that they should be established by way of budget estimates prepared by the staff for Board approval on an annual basis.

Pension costs are not quite so straightforward. This reserve in the past was referred to as the "Future Claims Reserve" and must include:

i) all claims reported and pensions established as a result of accidents within the year;

ii) the expected costs still to be determined from accidents already reported; and

iii) expected costs from accidents not yet reported.

In order to keep these functions and needs clear and distinct, separate accounts would have to be established and managed for each.

When there are sufficient funds to cover all of the anticipated expenses emanating from a given year, the fund is referred to as fully funded. This Board has been able to achieve this standard, and we think it is imperative that it be maintained. Boards in other jurisdictions have allowed themselves to "borrow from future generations" by relying on future revenues to cover the future costs associated with a pension issued in a previous year of injury or death. By not covering fully the incurred costs of each year's accidents, these Boards are considered to be underfunded, some to the extent of several million dollars -- a situation that makes those employers interested in long-term stability very nervous. They would rather pay full assessment rates now rather than get hit with one or more super assessments down the road.

The importance of assessment stability and fully funded pensions in the N.W.T. cannot be stressed enough by our committee. With the cyclical, transient and fragile nature of the northern economy it is imperative that assessment rates for any given year fully cover all actual and anticipated expenses for each and every pension. These include costs from the first year of accident when a pension is issued, all the price escalations anticipated over the lifetime of the pension, all the anticipated costs associated with the termination of the pension (i.e., spousal or other dependants') or death of the pensioner (i.e., death, funeral benefits and pension to spouse or other dependants, if any). It should be pointed out that any future estimates of pension costs or investment income are, at best, informed guesses. Because of changes in inflation and variable interest rates, both expenditures and income are in a continual state of flux. It is essential that updating be done at least annually in relation to the fund's performance and liabilities.

Pensions established prior to 1977 were covered by private insurance companies before the inception of the Workers' Compensation Board. These pensions were not indexed. Consequently, the N.W.T. Workers' Compensation Board has honourably taken responsibility for supplementing pre-1977 pensions to keep pace with the cost of living. The Board would like to negotiate the transfer of both the assets and liabilities from the private insurers to themselves but require a legislative mandate to do so. This Review Committee supports this initiative because it would bring all workers' compensation related pensions under one roof and would allow the investments from the pre-1977 pension funds to go to the actual pensioners rather than the private insurers.

Therefore, this Review Committee recommends:

- ***that the Workers' Compensation Board adopt a policy to:***

  - ***authorize the establishment of two distinct reserves consisting of an operating reserve and a contingency reserve;***

- ***describe the role of the contingency fund as the account required to minimize fluctuations in assessments and to reduce any undue burden to employers resulting from large scale disasters;***

- ***describe the method of determining the upper limit on the contingency reserve;***

- ***describe the operating reserve and the separate accouints which may be established and invested separately; such accounts to include an administrative account, a pension account, an established claims account and a pre-1977 pension account;***

- ***require that the pension account be fully funded:***

- ***require that the established claims account be fully funded;***

- ***continually update expenditures in relation to indexed pensions; and***

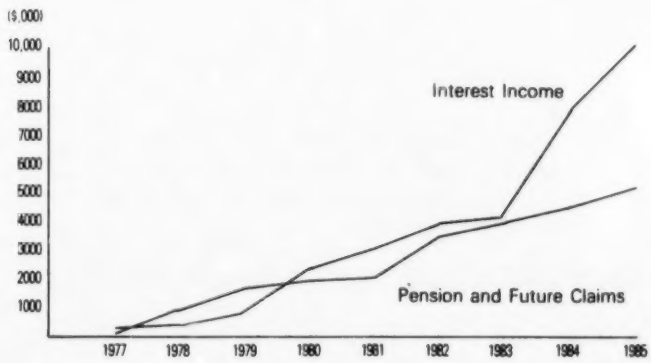
- ***continually update income in relation to investment performance.***

This Review Committee further recommends:

- ***that the Workers' Compensation Act be amended to authorize the Board to transfer pre-1977 pension assets and liabilities from private insurers.***

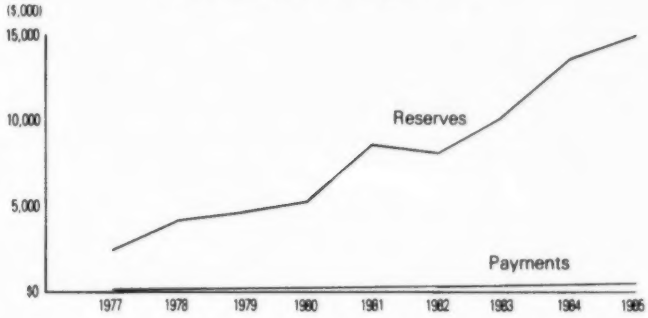
N.W.T. Workers' Compensation

Investment Income (Interest)
in comparison with
Pensions and Future Claims Expenditures



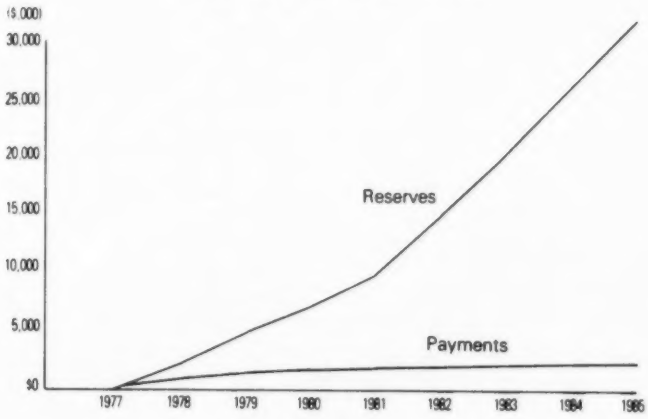
N.W.T. Workers' Compensation

Contingency Reserve Fund
Growth compared with Expenditures



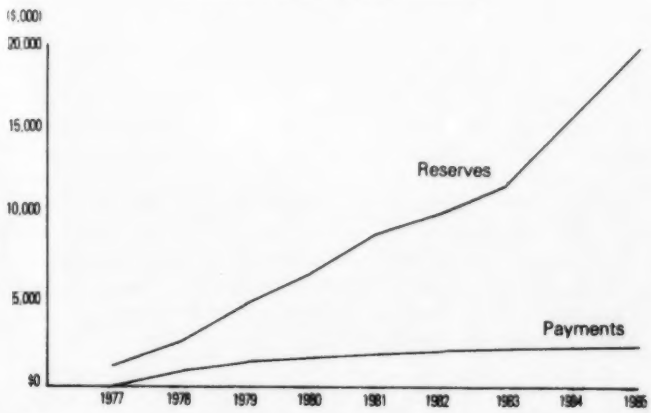
N.W.T. Workers' Compensation

Pension Liability Fund
Growth compared with Expenditures



N.W.T. Workers' Compensation

Future Claims Liability Fund
Growth compared with Expenditures



12. INVESTMENTS

In keeping with our earlier statements regarding the independence of the Board and the Accident Fund from government, we also feel that the responsibility for investing and handling moneys from the Accident Fund should be vested with the Board subject to our recommendations in chapter 11. We feel that the onus on the Board to undergo an audit and to report to the Legislative Assembly annually, in addition to the legislative restrictions on investment and the duty of trustee on individual Board members, is a sufficient system of checks and balances for public control.

This committee found that investments by the Board were a bone of contention with the business community and employers. Not only does the public see an enormous pot of money sitting there, but several intervenors commented on the conservative nature of the investments which had been made to date. They observed that there were sufficient low risk investments available that the Board could venture further than Canada government bonds. Their obvious feeling is that the greater the income which can be generated from investments, the lower the assessments to the employers of the North can be.

The other jurisdictions in Canada are authorized to invest in "securities authorized for the investment of trust funds". This could allow investment in low risk securities and equities other than government bonds or government guaranteed investments.

Therefore, this Review Committee recommends:

- ***that the Workers' Compensation Board continue to have sole authority to invest moneys from the Accident Fund;***

- ***that the Workers' Compensation Board members be given the formal responsibility for the safekeeping and proper management of the Accident Fund; and***

- ***that the current legislative restrictions that investment be made only in securities authorized by the* Financial Administration Act, *R.S.N.W.T. and section 63 of the* Canada and British Insurance Companies Act, *R.S.C. be broadened to include any other securities authorized for investment of trust funds.***

This Review Committee received submissions from the territorial business community suggesting that moneys from the Accident Fund be made available for investment in the North in support of the local economy. While we cannot stress strongly enough that moneys in the Accident Fund are held in trust for beneficiaries, consideration should be given to allowing a small portion of the Accident Fund to be invested in activities carrying a risk no greater than blue chip investments. However, these activities should be invested in companies or projects which are at arm's length from the Workers' Compensation Board and in only those projects where the Government of the N.W.T. will guarantee the investment of funds. Consequently, this committee recommends:

- ***that the Workers' Compensation Board be allowed to invest a small percentage of the Accident Fund in securities based in or involving the North which are at arm's length from the Board and which are guaranteed by the Government of the N.W.T.***

In addition, this committee examined provisions in the legislation from other jurisdictions and suggests the following ways the N.W.T. Act could be expanded and clarified. The Review Committee recommends:

- ***that the Accident Fund, investment of moneys from the Accident Fund and interest therefrom, and any real property owned by the Workers' Compensation Board be exempt from any federal, territorial or municipal taxation;***

- ***that the Board be empowered to acquire land and real property upon receipt of approval from the Executive Council of the Legislative Assembly of the N.W.T.;***

- ***that title to any real property or investments acquired by the Board be held in the name of the Board;***

- ***that provisions covering Board borrowing and repayment of moneys from the Accident Fund similar to those in P.E.I. (section 33) be examined for inclusion in the N.W.T. Act;***

- ***that if the Board is maintained at a size larger than three members, an investment committee with the assistance of expert advisers be struck to recommend appropriate investments to the Board for Board approval. In lieu of a committee, a fund manager should be appointed from among the Board members. In addition to recommending specific investments, the committee or fund manager should also be cognizant of the duration and nature of the fund's liabilities to ensure that investments mature at the proper time to allow for pay out on pensions or other liaibilities;***

- ***that the Workers' Compensation Board develop and make public their investment policy; and***

- ***that the Board continue to include a report on the performance of its investments in the annual report which it must present to the Legislative Assembly.***

13. MERIT REBATES/EXPERIENCE RATING

Merit rebating is a system of cash rebates extended to employers with good accident records. Experience rating is an attempt to assess each employer individually rather than simply combine similar employers in one class. The two procedures are similar in that individual employers can be rewarded or penalized depending on their claims record. Most jurisidictions use some variation of rewarding employers with low accident levels. All, including the N.W.T., have wide legislative powers to use their discretion to issue surcharges, rebates or penalties against employers.

Arguments have been voiced for and against such a safety inducement and as to whether such inducements accomplish their goals. Opinions presented have not been backed by any hard evidence in their support, although we are told that an Alberta study showed no relationship between merit rebates and safety. On the negative side, there are concerns that some employers "hide" accidents in order to improve their ratings.

The Review Committee paid particular attention to the experience of the B.C. Board which has combined its Workers' Compensation Board with Occupational Health. It is our firm belief that examining accident statistics alone is not sufficient in determining who is and is not a safe employer. Furthermore, there need not be a *specific* monetary reward for an employer to run a safe workplace. The extra costs of accidents, including replacement of injured workers, lost time, et cetera and the moral obligations themselves should be sufficient inducement. It naturally follows that, by surcharging unsafe employers, the remainder in any given class would benefit by the generally lower rates required to support the claims charged to that class. Therefore, this Review Committee recommends that:

- ***merit rebating be discontinued and experience rating as such not be instituted; and***

- ***the Workers' Compensation Board staff work closely with safety inspection departments to develop a system of focusing on unsafe work places.***

14. ADDITIONAL COVERAGE, DUPLICATION OF COVERAGE

There have been suggestions that workers' compensation is redundant and that its original role is being usurped by such social innovations as medicare, U.I.C. and collective agreements. What was once a partial wage replacement plan has been broadened to include medical aid and, more recently, compensation for injuries. In some instances injured workers may actually gain monetarily from their injuries. Now that we have universal medicare there is certainly a legitimate question as to why medical aid for job related injuries should be funded by the Workers' Compensation Board. Therefore, this Review Committee recommends:

- ***that the Minister responsible for the Workers' Compensation Board investigate the feasibility of removing the obligation to pay medical costs from the Workers' Compensation Board's mandate other than those costs associated with a claimant seeking a second medical opinion for the purpose of an appeal under this Act.***

In discussing these matters with participants, we found that many employers have private insurance schemes to cover the difference between workers' compensation and the full salary of their employees. For example, the N.W.T. government extends sick leave benefits to injured employees, which means that those employees are on full salary for at least two weeks, and that period may be extended for up to two years. Many large companies, including Esso and some mining companies, extend full salaried leave to injured workers for a period of time and many other employers extend additional compensation above legislated levels to injured workers, as a matter of course.

The issue also arises as to why there should be a separate compensation scheme for job related injuries in addition to separate compensation schemes for motor vehicle accidents, criminal injuries or private insurance schemes. The comprehensive universal insurance coverage scheme in New Zealand is often touted as an exemplary system and is, we feel, worthy of being examined in greater detail, especially in a jurisdiction with a population as small as that in the N.W.T. As we did receive several submissions commenting on this issue, this Review Committee recommends:

- ***that the Government of the N.W.T. keep abreast of universal insurance schemes already in place in other jurisdictions and that they examine the possibilities of introducing universal coverage in the N.W.T.***

15. EMPLOYER ASSESSMENT LEVELS

A number of submissions have been received expressing concern about assessment rates being too high. Many employers have expressed concerns that increases in YMIR will also increase assessments. We have been assured by the actuary and the Workers' Compensation Board staff that the current YMIR increase will be funded out of surplus Accident Fund revenue and that no net increase in rates will be required to support it. In fact, a net rate decrease that will hold assessment revenue at its present volume is promised.

In 1977, when the fund first started, there was good reason to err on the side of caution in building up the Accident Fund. However, we believe that fund has reached and surpassed the point where all pensions and most disaster contingencies could be covered. The attached graphs on pages 40 and 41 illustrate the comparatively high rates paid by N.W.T. employers in support of compensation.

Until 1980, income from investments was not significant but in the past five years it has grown until it now accounts for 38 per cent of revenue. While a substantial portion of the investment income could be targeted toward pensions and future claims, that leaves a significant surplus in recent years which could be applied to assessment reduction. The actuary has also agreed that there are surpluses in the future claims fund. While some of these surpluses may rightfully be targeted for past pension increases, the remainder should be applied to assessments. The Review Committee has made several recommendations in other chapters which we feel will help increase efficiency and reduce assessment levels.

Therefore, this Review Committee recommends:

- ***that the Board make vigorous attempts to reduce assessment rates in general.***

16. TRANSFER OF OCCUPATIONAL HEALTH AND SAFETY

Currently in the N.W.T. the area of public administration responsible for inspecting and regulating an industrial workplace for safety standards is separate from the arm that compensates injured workers for accidents occurring in the workplace. Both agencies share a desire to reduce accidents in the workplace. However, the Workers' Compensation Board reports to the Minister of Health and Social Services and the Occupational Health and Safety Division reports to the Minister of Justice and Public Services. There appears to be virtually no communication between the two agencies.

We received several submissions stressing the need for these two functions to be brought closer together. Intervenors also wanted the Workers' Compensation Board to play a greater role in reducing accidents in the workplace. After all, they stressed, safety is not just removal of hazards, it is a philosophy and a way of organizing and doing one's work. We found that some ideas had been generated within the Government of the N.W.T. toward bringing the institutions closer together. Various options for transferring Occupational Health and Safety to the Workers' Compensation Board or for creating a new department of labour have been raised but none of the parties involved appear to have had the opportunity to study these options in any depth. We suggest that this is an area for independent analysis by a separate task force or review committee.

However, we do feel that there are a few measures that could be followed in the short term which might assist in facilitating better communication between the two agencies. Therefore, this Review Committee recommends:

- ***that the Workers' Compensation Board, the Occupational Health and Safety Division and any other workplace inspection agency responsible to the Government of the N.W.T. report to the same Minister;***

- ***that the Commissioner-in-Council authorize the Workers' Compensation Board to levy penalties by way of fines or increased assessments on employers found to be in violation of any safety regulations by any workplace inspection agency or official of the Occupational Health and Safety Division;***

- ***that officials of the Occupational Health and Safety Division or of any other Government of the N.W.T. workplace inspection agency be obliged to forward a copy of all inspection reports and to inform the Workers' Compensation Board of all infractions of safety regulations;***

- ***that the Workers' Compensation Board claims officers be obliged to inform officials of the Occupational Health and Safety Division and any other Government of the N.W.T. workplace inspection agency of all workplace injuries or deaths which appear to involve unsafe incidents or workplaces;***

- ***that the Workers' Compensation Board be authorized to negotiate similar types of information exchange with federal workplace inspection agencies pertinent to the N.W.T.;***

- ***that the Workers' Compensation Board increase their budget and activity to improve public information on the Workers' Compensation Board in general and workplace safety in particular; and***

- ***that the Workers' Compensation Board be authorized to enter joint funding arrangements with the Government of the N.W.T. (Occupational Health and Safety Division and other workplace inspection agencies) and St. John Ambulance to develop, produce and distribute safety training and accident prevention programs; and***

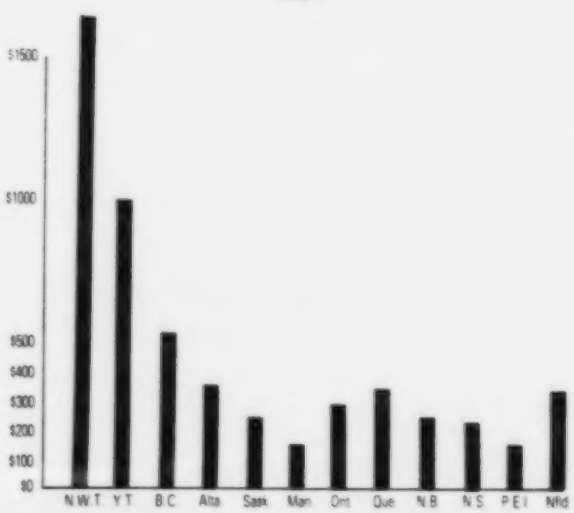
- ***that in instances where safety programs are developed for a particular employer, the expenses for that program be charged back to the class of that particular employer.***

We feel that these recommendations would increase the effectiveness of both agencies in getting all parties to take safety seriously. It would increase the communication between the two agencies without compromising their current independence and would, hopefully, enhance the effectiveness of each and help prevent serious accidents from occurring in the first place. The overall impact would, hopefully, be a reduction in costs.

WORKERS' COMPENSATION BOARD TOTAL INCOME PER EACH WORKER COVERED

(Source - Workers' Compensation in Canada, Differences in Law - K. Harding)

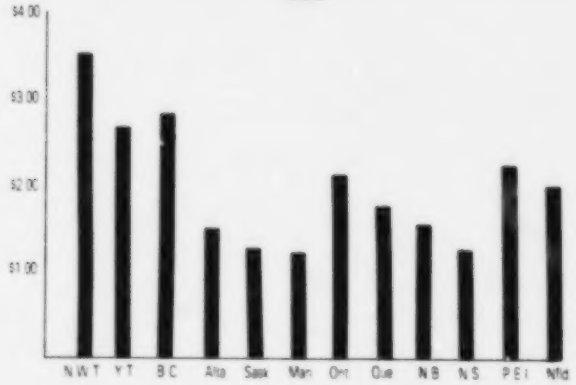
1984



AVERAGE RATES OF ASSESSMENT IN CANADA

(Source - Workers' Compensation in Canada, Differences in Law - K. Harding)

1985



17. REHABILITATION AND RETRAINING

It is customary in the N.W.T. that most physical rehabilitation and retraining of injured workers is currently administered out of the territories. Locations in both Alberta and British Columbia are widely used as a result of their superior facilities, and there is not at present any rehabilitation centre in the N.W.T.

The committee received numerous submissions from both employer and employee groups who wish to see a rehabilitation centre in Yellowknife. During our research it became apparent that the issue of a centrally located rehabilitation centre in the N.W.T. was not a new idea and was suggested to the 1981 task force as well as to this committee. As a result of the present lack of an N.W.T. facility, some employers have instituted retraining programs on the job site while others have offered to share the cost of retraining with the Workers' Compensation Board.

It was strongly suggested by all groups that removing an injured worker from his family during rehabilitation and retraining not only adds an additional financial burden (by having to support two homes, one in province and one out of province) but is not conducive to helping the worker and his family to adjust to the new situation. In some cases, it is even said to be detrimental and only lengthens the process of rehabilitation and retraining.

Although the committee does not feel that the employer should be legislated to incur a large proporation of the cost of rehabilitation, we do feel that a centrally located rehabilitation centre is needed in the N.W.T. This could, in the long run, reduce the financial costs of rehabilitation and retraining in the N.W.T. by removing the majority of the high transportation and relocation costs presently incurred by the Board.

The building of the new hospital in Yellowknife will increase the amount of assistance available to injured workers but is still not enough to meet the present needs. On the other hand, we realize that an independent rehabilitation and retraining facility, if it were used exclusively for injured workers, might not be practical on its own but it could be combined with other facilities. Therefore, this committee recommends:

- ***that the Workers' Compensation Board look into establishing a rehabilitation and retraining centre in conjunction with the extended care facility that is currently being planned;***

- ***that the rehabilitation and retraining facilities could be used by both injured workers and the N.W.T. health care and that the costs could be borne respectively by each party;***

- ***that the Workers' Compensation Board and N.W.T. health care share the cost of providing competent medical professionals to administer both the facility and the treatments required; and***

- ***that retraining is a legitimate role for the Workers' Compensation Board and it be continued through on the job experience and institutions such as Arctic College.***

18. LIGHT DUTY PROGRAM

Although there is no official legislation in the N.W.T. Workers' Compensation Act for a formalized modified work program, it is something that is used sporadically throughout the N.W.T. The basic concept of this program is to assist both the inuured worker and the employer with reintegration into the work force after a compensable injury.

There are many cases in the N.W.T. where workers may not be able to return immediately to their former jobs, but may be able and willing to perform other lighter tasks for the employer.

The majority of employers seem to be willing to formulate such a program and to pay the worker at a reduced rate based upon the modified work duties. It would then be up to the Board to supplement the wages to the worker's former level.

There are many advantages of such a program to all parties concerned. For instance, workers may return to work sooner than expected and have a feeling of accomplishment and self-confidence while re-establishing themselves in the work force. The employer has the use of the injured worker for tasks which need to be done and also has a shorter period of time while the worker is off work on a compensable injury. The employer may also benefit if that worker is retrained to the specific needs of the operation. The Workers' Compensation Board would be able to "top off' wages and thereby have an actual payout which is greatly reduced from the original estimtes. Also, any formalized retraining could be performed right on the job site.

There are, however, certain inherent shortfalls to this approach if it is not properly administered. Also, it must be recognized that not every employer will be able to offer modified work duties. Without proper direction, the program could be greatly abused and could simply take on the "walking wounded" scenario. Employees could find themselves performing work which is only going to result in an aggravation to the previous injury.

We have received submissions from both labor and employer groups who wish to see a modified work program in the N.W.T.

Workers' Compensation Act. It is interesting to note that both groups have outlined the above mentioned areas of concern and agree that certain restrictions must be applied in order to make such a program effective.

The committee therefore recommends:

- ***that the Act be amended to include a modified work program;***

- ***that the program should be on a voluntary basis with mutual agreement by the attending physician, Workers' Compensation Board, employer and injured worker;***

- ***that the duties to be performed while on modified work shall be approved in advance by the attending physician and the Workers' Compensation Board;***

- ***that the program be monitored by the Workers' Compensation Board; and***

- ***if the employer does not pay the pre-injury rate of pay, then the Workers' Compensation Board shall pay the difference between that salary and the pre-injury base pay.***

19. MEDICAL ADVISERS

In the N.W.T. there is one medical adviser who is hired by the Board and is used to advise the Board on medical opinions in regard to claims. He is paid out of the Accident Fund and has his office within the Workers' Compensation Board's offices. No independent medical adviser is provided to the claimant as of right. However, the Board's medical adviser may choose to send a worker out to see a specialist for a second opinion. These costs of transportation and accommodation will be covered by the Board.

All medical information submitted to the Board is currently confidential and not accessible to the worker or any third party. It is our opinion that the worker, his dependant or representative should have access to his own medical files and records upon written request to the Board or claims officer.

We also feel that once a claim is submitted to the Workers' Compensation Board, all the necessary investigation needed to settle a claim will be requested by the Board or claims officer, and the involvement of the employer allowed in section 19 is not required. Therefore, this Review Committee recommends that the Workers' Compensation Act be amended:

- ***to ensure that an injured employee upon his written request or that of his dependant or representative shall be entitled to seek a second medical opinion and that the cost shall be paid for by the Workers' Compensation Board;***

- ***to remove sections 19(1), (2), (3) and (4) from the Act because there is no need at this point for further employer involvement;***

- ***to include in both sections 24 and 25 or any other section concerned with reviews or appeals the right of the appellant or his representative, upon written request and before any review or appeal, to have full access to all information and reports contained on his file.***

20. RIGHT TO RETURN TO WORK AND TO JOB PLACEMENT

In examining jurisdictions across Canada, we found that Quebec was the only province which guaranteed a worker the right to return to his pre-injury job or, after rehabilitation, to be placed in an equivalent job. This type of provision is designed to overcome the situation where a worker is off work for a few days only to find that while he was away on doctor's orders, he was fired and somebody else was hired in his absence.

This committee felt there should be some statutory protection from arbitrary actions by employers which could result in great hardship for a worker and his family, especially in northern communities where termination could mean loss of housing benefits and job replacement opportunities. On the other hand, we were mindful of the need to place limits on these rights so as not to create an oppressive burden on employers. Consequently, this Review Committee recommends that the Act should be amended to:

- ***ensure that an employer reinstates an injured employee to his former job if he is able to return to work within three months of the date of that employee's accident, on the condition that the medical adviser and Workers' Compensation Board certify that the employee is fit and able to perform such work;***

- ***ensure that an employer provides preferential hiring to an employee who is not able to return to work until after three months after the accident, such preferential consideration being for the previous position held by the employee or for an equivalent position;***

- ***ensure that an employer provides preferential hiring to previously injured employees who are unable to perform the job they occupied at the time of the accident as a direct result of that accident; such preferential consideration being for equivalent, suitable employment in that or in another local establishment of the employer;***

- ***ensure that employment alternatives which necessitate a move by the employee are mutually agreeable to the employer, the employee and the Workers' Compensation Board and that the costs of the move will be paid for by the employer and the Workers' Compensation Board in equal shares;***

- ***ensure that if the previously injured worker returns to work at a reduced wage and the reason for that reduced wage is directly related to the injury, the Workers' Compensation***

Board shall pay to the employee the difference between the pre-injury wage and the post-injury wage until such time as the employee returns to his pre-injury wage level;

- ***provide an employer who does not re-employ a previously injured worker with an opportunity to show cause why he has not done so;***

- ***provide an employer with all the provisions for appeal contained in the Act; and***

- ***authorize the Board to penalize an employer for failing to show just cause for not rehiring a previously injured worker.***

21. WORKERS' ADVOCATES

This committee found that the position of workers' advocate or employers' advocate was provided for in at least eight jurisdictions throughout Canada. We also received several submissions in support of creation of such a position. While we realize that there is not enough volume to support a full-time workers' advocate, we feel that there is sufficient need to justify a workers' advocate part-time.

In the long term, we feel that the office which really needs to be created in the N.W.T. is that of ombudsman. When that takes place, we would expect the personnel to be well versed in Workers' Compensation Board legislation, practice and procedure. The ombudsman's office would provide the personnel to act as workers' advocate for all employees requiring the service and would receive funding for this from the Accident Fund.

In the short term, we recommend that the position of workers' advocate be provided for in legislation and that it be filled on a part-time basis. The workers' advocate would have the authority to assist any claimant he felt had a valid claim and to decline those cases felt to have no merit. The workers' advocate would be able to provide information to claimants on interpretation of the Act and on Workers' Compensation Board requirements and procedure and would be able to do research and consult with whatever experts were considered advisable for the purpose of appeal. He would upon written authorization from the claimant have access to all files, reports and other pertinent information regarding the claimant and would be able to represent or appear on behalf of a claimant during any Board proceedings authorized under the Act. With regard to situations where the workers' advocate declines to provide assistance, we suggest that the claimant be provided with written reasons for the advocate's decision within 30 days of that decision being made.

All salaries, benefits, administration costs and expenses associated with specialists incurred by the workers' advocate would be paid from the Accident Fund. We would suggest that the workers' advocate office not be located within the Workers' Compensation Board offices because it is essential that independence from the Workers' Compensation Board be perceived as well as real. The advocate would be hired by and would report to the Minister responsible for the Workers' Compensation Board. The existence of a workers' advocate should be well advertised and there should be a toll free workers' advocate telephone number within the N.W.T. In the short term, consideration could be given to the workers' advocate's working out of an established public legal assistance office such as Legal Aid, the Native Courtworkers of the N.W.T., the Public Legal Education Society or Storefront.

Therefore, this committee recommends:

- ***that the Workers' Compensation Act be amended to make provision for a workers' advocate to be established and be funded from the Accident Fund;***

- ***that the Government of the N.W.T. develop and establish an ombudsman's office in the N.W.T. which would, among other functions, act as the workers' advocate;***

- ***that until such time as an ombudsman's office is established in the N.W.T., a part-time workers' advocate be hired by the Minister responsible for the Workers' Compensation Board with all expenses paid from the Accident Fund.***

- ***that the independence of the workers' advocate from the Workers' Compensation Board be maintained in all respects including office location, reporting requirements, access to information and consultation with experts; and***

- ***that the workers' advocate have the authority and discretion to accept or decline a claimant's case depending on its merits and that where declining a case, the workers' advocate be obliged to provide the claimant with written reasons within thirty days of determining that decision.***

22. RIGHTS OF ACTION

Under all Workers' Compensation Board schemes in Canada, the rights of injured workers or their dependants to take legal action against their employer are extinguished even if the injury or death of the worker was caused by the negligence of that employer, provided the employer is covered by the Act.

Most jurisdictions also extinguish the workers' right of legal action against any other employer or workers who are covered by the Workers' Compensation Act. A right of action does continue to exist against any person not covered by the Workers' Compensation Board scheme but most Boards are given the authority to decide whether or not that action can proceed.

The N.W.T. workers' compensation legislation leaves open the right of an employee or dependants to take legal action against any person other than the employer whose negligence was the cause of injury or death.

Recently, those provisions of the Newfoundland workers' compensation legislation which extinguished a worker's right of access to the courts against his employer were challenged on the grounds of violating seciton 15 of the Canadian Charter of Rights and Freedoms. Section 15(1) reads:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Just this month the Trial Division of the Supreme Court of Newfoundland decided that sections 32 and 34 of the Newfoundland Workers' Compensation Act infringe and deny the plaintiff (spouse of the deceased worker) a fundamental right guaranteed under the Charter and that such a denial is not a reasonable one demonstrably justified in a free and democratic society. Justice Hickman examined the question of whether the legislative goal of establishing a no-fault insurance scheme to provide to injured workers a speedy assessment of entitlement to compensation benefits was demonstrably justified. In reaching his conclusion he examined similar schemes in other countries as well as the right of action against other employers and their employees available under the Newfoundland workers' compensation legislation. He found that such a goal could be achieved without eliminating a worker's right to pursue an action in the court against any tortfeasor (party who causes a civil wrong). Consequently, both the section extinguishing a worker's right of action in the courts against his employer and the section giving the Workers' Compensation Commission the right to determine whether the action is one prohibited by the Act were found ultra vires and made inapplicable by section 15 of the Charter.

We are informed that this issue is being pursued in the Ontario and Alberta courts and that the Newfoundland decision will be appealed to a higher court. This Review Committee cannot prejudge the outcome of further litigation. However, we recommend:

- ***that the consequences and alternatives to deleting section 12(1), (2) and (3) and amending section 12(4) be thoroughly reviewed in the immediate future in co-ordination with the Workers' Compensation Board of the N.W.T. and the Association of Workers' Compensation Boards of Canada.***

The loss of a worker's right to sue his employer has been the historical "trade-off" for the employer's paying for the mandatory no-fault insurance scheme. If this protection is eliminated, employers will likely not be pleased with having to submit to such a mandatory insurance scheme.

On the other hand, private liability insurance coverage for employers may not be available or affordable. We are told that it has become virtually nonexistent, because workers' compensation legislation in every province and territory eradicated the need a decade or more ago. Furthermore, the costs of liability insurance have accelerated to the point where costs have become prohibitive in the last few years.

Removal of an employer's protection may also encourage him to implement greater safety measures.

If the employee/dependant is provided the right to sue employers as well as others for negligence, then issues which flow from that right should be addressed. They include whether the Board should be subrogated to the action, whether the injured worker should receive only the proceeds of the private claim or if their proceeds should be supplemented from Workers' Compensation Board payments if the court award is less than the Workers' Compensation Board compensation.

We would like to point out another fairly recent development which further erodes the inviolate position of employers. In *Berger* v. *Willowdale A.M.C. et al* 41 O.R. (2d)89, the Ontario Court of Appeal found that an executive officer of a corporation is specifically excluded from application of the Workers' Compensation Act and can therefore be sued in his personal capacity. In this case, an employee of his company who was injured while in the course of employment sued the president of Willowdale A.M.C. in an action for negligence. The court found that he was personally in breach of his duty to provide and maintain a safe working place, including the means of reaching that working place, and found him guilty of negligence. The Supreme Court of Canada denied the appellants leave to appeal this case in May, 1983.

23. INTERJURISDICTIONAL COVERAGE

No doubt, the administration of the Workers' Compensation Board in Canada would be simplified in many ways if it were a federal rather than provincial responsibility, especially for employers who work outside of their home province. All jurisdictions permit coverage of workers while employed for varying lengths of time outside of their home provinces. Length of time is usually six months but Quebec allows up to five years.

Some legislation, including the N.W.T., makes reference to the avoidance of double assessments. Each jurisdiction prefers to collect assessments from employers for *all* work done within their boundaries. However, it is not reasonable to expect employers to separate assessments on minor out-of-province work, hence the six month or other time extension for that work.

It would seem more equitable to remove the option now available to workers to claim under the jurisdiction of their choice and to oblige them to claim under the jurisdiction in which assessments are paid. Coverage should still be extended to workers whose employers, for whatever reason, do not provide Workers' Compensation Board coverage. In such cases, the N.W.T. Workers' Compensation Board could seek redress.

Therefore, this Review Committee recommends:

- ***that the Act be amended to withdraw the option of the worker to claim compensation in the jurisdiction of choice and to specify that claims be processed only in the jurisdiction in which assessments are paid.***

24. COLLECTION POWERS

All jurisdictions have legislation giving them a wide range of power in collecting assessments. Upon consideration, the workers' compensation scheme is simply an insurance plan, albeit mandatory, and the Board is a creditor not unlike other creditors to which an employer may be indebted.

This committee feels the powers currently held by the Board should be softened in favor of the employers. Although we received a

written representation from legal counsel to the Board outlining how the collection powers of the Board could be strengthened, we have not received any representations as to why this should be the case or why the Board should be treated in preference to any other creditor attempting to identify and collect a debt.

This issue may very well be one which should be examined in further detail by another review process. However, we feel there are a few issues which, if altered procedurally, might reduce the need, if any, for wider collection capability.

At the beginning of a calendar year employers are required to estimate their yearly payroll. They can be penalized if that estimate is too low. Obviously, many employers, particularly contractors bidding on various construction projects, have a great deal of difficulty in estimating that payroll. Also, they will consistently err on the low side. Rather than paying premiums in a lump sum, or by way of installments based only on those estimates which the employer provides to the Workers' Compensation Board at the beginning of the year, a preferable system would be something similar to the Canada Pension Plan and unemployment insurance plan. The notion of these "pay-as-you-go" plans is that the employer makes regular payments of assessments which coincide with pay periods. This would keep assessment premiums up-to-date with workers' salaries and would eliminate the need for updating assessments at the end of the year. It would also keep the Board in regular contact with the employer throughout the year, providing the Board with information updates and a means of monitoring the status of the employer.

With respect to contracting projects, the principal, or in cases where there is a sub-contractor, the principal *and* the contractor can be held liable for assessments. Unquestionably, the principal and contractor should be responsible for requiring sub-contractors to register with the Workers' Compensation Board. However, it is not fair to require those parties to ensure that contractors or sub-contractors working for them have in fact paid their assessments and that those assessments were accurate. In other words, it should be incumbent on Workers' Compensation Board assessment staff to collect assessments from the responsible employer and to issue a report or certificate of good standing to the principal or sub-contractor upon request.

Section 74(6) and (7) of the Act puts an onus on an employer wishing to sell any stock or equipment associated with his business to furnish a prospective purchaser with a certificate from the Board stating that the Board has no claim outstanding against the employer. If the purchaser fails to obtain such a certificate from the vendor, he is liable to the Board for the debt owed by the vendor. We have found that there is no widespread awareness of this provision and if it were adhered to, it would place an expensive burden on vendors and Workers' Compensation Board staff. We feel that the suggestions we have made regarding regular reporting and payment of assessments may alleviate the need for such a strong measure, so we would recommend that this section be rescinded. If the Board has an outstanding claim against any employer, it obviously has the right to secure a judgment against an employer or other party and to register it against the title to the real property or assets of that party. To demand clearance from the Workers' Compensation Board on every transaction involving stock or real property is unnecessary.

Employers are required to submit employees' T-4 income tax summaries to the federal government not later than February 28th of the following year. Since Workers' Compensation Board summaries are based on the same payroll information, it makes sense to continue to use February 28th as the final date for Workers' Compensation Board summaries and not an earlier date as has been recommended by some.

This Review Committee recommends:

- ***that section 74(6) and (7) of the Act be rescinded;***
- ***that employers have the option to pay assessments on a monthly or regular basis as those assessments accrue; and***
- ***that year-end deadlines for summaries of assessments be the 28th day of February.***

25. LEGISLATION IN GENERAL

During the committee's review of the Workers' Compensation Act, it became apparent that there is a need for a certain amount of general clean-up within the legislation. Most of the following recommended changes are for the purpose of updating and clarification within the Act itself.

It is the opinion of this committee that these recommendations will assist workers, employers and the Workers' Compensation Board staff in interpreting the Act.

Therefore the Review Committee recommends:

- ***that a clause be placed in the Workers' Compensation Act stating "that whenever the masculine gender is used, it shall be considered to include the feminine gender";***
- ***that wherever the words "widow" or "widower" are used, they shall be changed to read "spouse" or "spousal" as applicable;***
- ***that, upon the rewriting of this Act, a concerted effort be made on behalf of the appropriate departments to simplify the language in the Act and make it less difficult for the public to read and understand;***
- ***that section 2(h) be changed to remove the words "means a member of the family of a worker who, at the time of his death" and replace with "means a person who, at the time of a worker's death";***
- ***that section 2(i) be changed to remove the words "which includes the employer where he is self-employed" and to combine section 2(i)(i) and section 2(i)(ii) to be the new section 2(i)(i);***
- ***that section 10(1)(c) be changed to read "(c) an employers or self-employed person".***
- ***that section 28(1)(a) be changed to read "(a) cohabited with a person and where the Board***

is satisfied that such person was dependent upon the deceased worker for maintenance and support"; or

- *that section 28(1)(b) be changed to read "(b) cohabited with a person and where the Board is satisfied that such person was dependent upon the deceased worker for maintenance and support and they had one or more children, or a child is born as a result of their union before the death;*

- *that section 55(2) be removed from the Act and that section 55(3) become the new section 55(2);*

- *that in section 55(3) the words "Senior Financial Officer" be removed and replaced with "Commissioner or designated Minister responsible for the Consolidated Revenue Fund";*

- *that section 58(1) be changed to read "(1) The accounts of the Board shall be annually audited by the Territorial Auditor.";*

- *that section 58(2) be replaced with "The Board shall, on or before the 31st day of May in each year, prepare a report on the preceding fiscal year which shall:*

  (a) state the activities of the Board;

  (b) include the financial statements of the Board prepared in accordance with appropriate accounting policies applied on a basis consistent with that of the preceding year which shall include:

    (i) a statement of financial position presenting fairly the financial position of the Board at the end of the fiscal year;

    (ii) a statement of operations that presents fairly the operating results for the fiscal year;

    (iii) a statement of changes in financial position which presents fairly the changes in financial position for the fiscal year; and

    (iv) such other statements, schedules and notes as may be necessary to present fairly the information contained in the financial statements;

  (c) include the report of the auditor;

  (d) include the opinion of the Board's actuary as to the liabilities of the Accident Fund and the adequacy of the reserves; and

  (e) include such other information as the Minister or the Board may require.";

- *that section 58(3) be changed to read "The auditor shall report annually to the Minister on the results of his examination of the accounts and financial statements of the Board and the report shall state whether, in his opinion,*

  (a) the financial statements present fairly the financial position at the end of the fiscal year and results of the operations and the changes in financial position for that year in accordance with appropriate accounting policies applied on a basis consistent with that of the immediately preceding year;

  (b) proper books of account have been kept and the financial statements are in agreement with the books of account; and

  (c) the transactions that have come under his notice are within the powers of the Board under this Act and the regulations made under this Act and any other act and regulations that apply to the Board;

  (d) and the auditor shall call attention to any other matter falling within the scope of his examination that, in his opinion, should be brought to the attention of the Legislative Assembly.";

- *that section 58(4) be changed to read "The auditor may require the officers and employees of the Board:*

  (a) to produce all records, documents, books, accounts and vouchers kept in respect of the administration of this Act; and

  (b) to provide such information and explanations as he deems necessary.";

- *that section 58(5) be included to read "The Board shall submit the annual report referred to in section 3 to the Minister on or before the 31st day of May in each year.";*

- *that section 58(6) be included to read "The Minister shall table before the Legislative Assembly a copy of the report referred to in section 3 at the first session of the Legislative Assembly following the receipt of the report.";*

- *that the existing section 58(4) of the Act, become section 58(7); and*

- *that section 3(3) of the regulations be changed to read "(3) Where regularly scheduled public transportation is unavailable or inconvenient, the worker may make use of a private motor vehicle and shall be reimbursed by the Board for the cost of fuel used, as well as a kilometer rate to be set by the Board and adjusted on a regular basis."*

26. MANDATORY REVIEW OF ACT

The Review Committee believes that consistent review of the workers' compensation scheme is advisable. Such reviews are mandatory in Saskatchewan and Newfoundland and are conducted regularly as a matter of course in other jurisdictions.

Although the Board is accountable to the Legislative Assembly through the Minister of Health and Social Services, mandatory annual reporting and auditing, the committee feels that the Board should be subject to an independent review every three years. The rationale behind this relates to the public concern regarding the existence and the size of the Accident Fund as well as the treatment and welfare of injured workers. In addition, such reviews could help provide political impetus for implementation of recommendations by consecutive committees.

Review Committees should not be restricted in the scope of their undertaking but should be authorized to comment on any matter within the scope of the Act, the regulations and administration of the Board, issues of the day which it deems pertinent and significant, or any other matter which it may be directed to examine by either the Minister or the Executive Committee.

All expenses of Review Committees should be paid out of the Accident Fund.

We refrained from suggesting a minimum or maximum number of members for the committee because the Minister should have the discretion to appoint the committee he thinks is required to undertake the task as perceived at the time. Given that the legislation, regulations and administration are subject to review every three years, the tasks of the Review Committee may vary from being focused on one or more issues to being general and comprehensive. Therefore, this Review Committee recommends:

- ***that the Minister appoint a committee every three years to review, consider, report and make recommendations on the Act, the regulations, and the administration of the Workers' Compensation Board;***

- ***that the terms of reference would allow the committee to consider any other matters it deemed appropriate or any matter which the Minister might refer to their attention.***

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2. Association of Workers' Compensation Boards of Canada
3. Auditor General's Office
4. Canadian Association of Industrial Mechanics and Allied Workers
5. Canadian National
6. Canadian Petroleum Association
7. Cominco Ltd.
8. Construction Workers' Union – James Evoy
9. Cooper, Johnson, Hardy & Fournier
10. Crawford Laing, Actuary
11. Tom Embleton
12. Giant Yellowknife Mines Ltd.
13. Dr. George Gibson, Medical Adviser to N.W.T. Workers' Compensation Board
14. Government of the N.W.T. – Department of Finance
15. Government of the N.W.T. – Department of Justice
16. Government of the N.W.T. – Department of Personnel
17. Knud Rasmussen Drilling and Blasting Ltd.
18. Mike Moore, Chairman, N.W.T. Workers' Compensation Board
19. Norm's Stationery Ltd.
20. Northern Transportation Company Ltd.
21. Northwest Territories Construction Association
22. Northwest Territories Federation of Labour
23. N.W.T. Association of Municipalities
24. N.W.T. Business Council
25. N.W.T. Chamber of Mines
26. N.W.T. Public Service Association
27. Points North Transportation
28. Purvis Navcom Shipyard Ltd.
29. Reno Sartor
30. St. John Ambulance
31. Sunrise Helicopters Ltd.
32. T.L.R. Leasing Ltd.
33. United Steelworkers of America
34. William M. Mercer Ltd.
35. Oscar Menard on behalf of Claims Services Division, Workers' Compensation Board staff
36. Several Workers' Compensation Boards across Canada
37. Yellowknife Chamber of Commerce